Our Way, Inc. *and* International Brotherhood of Firemen and Oilers, AFL–CIO *and* Alex Smith. Cases 10–CA–16207, 10–CA–16742, 10–CA–16809, 10–CA–17089, and 10–CA–16288

20 December 1983

DECISION AND ORDER

On 14 April 1982 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified, and to adopt the recommended Order.

The judge, relying on *T.R.W. Bearings*, 257 NLRB 442 (1981), found that the Respondent's rules prohibiting employees from distributing literature and soliciting during "working time" are presumptively invalid. We do not agree. Although *T.R.W. Bearings* held that rules prohibiting employees from soliciting during "working time" are, together with rules prohibiting soliciting during "working hours," presumptively invalid, we no longer adhere to that decision and shall overrule it. The judge also found that the Respondent unlawfully modified and enforced its no-solicitation and no-distribution rules. We agree.

The Respondent's work rules state:

> In order to make our company a better place to work, the following are *Prohibited*: . . . 7. Soliciting, collecting or selling for any purpose during the working time of the soliciting employee or the working time of the employee being solicited.

The Respondent also distributed an employee handbook stating:

> SOLICITATION/DISTRIBUTION—In order to prevent disruption in the operation of the plant, interference with work and inconvenience to other employees, solicitation for any cause, or distribution of literature of any kind, during working time, is not permitted. Neither may an employee who is not on working time, such as an employee who is on lunch or on break, solicit an employee who is on working time for any cause or distribute literature of any kind to that person. Whether on working time or not, no employee may distribute literature of any kind in any working areas of the plant.

The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). "Working time is for work" is a long-accepted maxim of labor relations. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). From that case until *T.R.W. Bearings*, above, the Board has held that rules prohibiting solicitation during working time are presumptively lawful because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees' own time.[3] Although the Board did not initially distinguish between rules using "working time" and rules using "working hours," in *Essex International*, 211 NLRB 749 (1974), the Board made clear that rules using "working hours" are

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] As the evidence of the Respondent's union animus is otherwise convincing, we find it unnecessary to rely on the findings in the section of the judge's decision entitled "Other Evidence of Animus," particularly those incidents involving a supervisor's obtaining lunch for nonstriking employees.

We also find unnecessary, and do not rely on, the judge's alternative finding that, even in the absence of majority status, a bargaining order is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Member Dennis agrees that the Respondent violated Sec. 8(a)(5) and (1) of the Act by granting wage and benefit increases on 14 November 1980 to the employees at its Tucker plant and by refusing the Union's request on 4 December 1980 to negotiate about the increases. In rejecting the Respondent's 10(b) defense to these allegations, Member Dennis relies solely on the judge's finding that the Respondent's bargaining obligation at Tucker arose on 25 September 1980 and the limitation period commenced on that date at the earliest.

Member Dennis does not agree with the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to grant an increase in wages and benefits to its Elizabeth Street employees. The judge relied on *Clearwater Finishing Co.*, 254 NLRB 1168 (1981), enf. denied in part 670 F.2d 464 (4th Cir. 1982), and *Eastern Maine Medical Center*, 253 NLRB 224 (1980), enfd. 658 F.2d 1 (1st Cir. 1981), which cases Member Dennis believes are inapposite. Those cases found violations of Sec. 8(a)(1) and Sec. 8(a)(3) and (1), respectively, because the employers granted wage increases to employees outside the unit, but not to those within it. In this case, the Respondent granted increases to part of the unit at Tucker, which the complaint alleged and the judge found violated Sec. 8(a)(5) and (1). The complaint contains no specific allegations that the Respondent violated any section of the Act in failing to give increases to the Elizabeth Street employees, nor is Member Dennis able to conclude that any theory supporting the finding of a violation was fully litigated. Accordingly, she would reverse the judge's finding of a violation.

[3] Prior to *T.R.W.* the Board, although it may have waivered, did not definitively rule otherwise. In *Campbell Soup Co.*, 159 NLRB 74 (1966), the Board found that a rule prohibiting distribution during "working time" and prohibiting solicitation during "Company working hours" was invalid. In *Avon Convalescent Center*, 200 NLRB 702 (1972), the Board did find that a no-solicitation rule using "working time" was invalid but ordered the company to cease from "[m]aintaining a rule forbidding employees from engaging in union solicitation *during their nonwork time* in any area of its premises." Contrary to our dissenting colleague, we believe that our decision here is compatible with *Campbell* because the rule there used the term "working hours" and with *Avon* because a rule, like the one in this case, prohibiting solicitation during worktime creates a clear implication permitting solicitation during nonworktime, which meets the terms of the order in *Avon*.

presumptively invalid because that term connotes periods from the beginning to the end of workshifts, periods that include the employees' own time. The Board also held, in contrast, that rules using "working time" are presumptively valid because that term connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods.

The Respondent's no-solicitation and no-distribution rules conform not only with the standards set by *Peyton Packing*, above, but also with the standards of *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962), a leading case widely cited for years as defining the balance among the rights of employees, employers, and unions with respect to the legal and practical problems presented by solicitation. See Morris, *The Developing Labor Law*, "Restrictions on Union Activity on Employer Property," pp. 82–90, BNA (1971), and "Employer's Restrictions on Union and Employee Activity on Employer's Property," pp. 88–107, BNA (1983); Schlossberg, *Organizing and the Law*, "The General Rules Governing Employee Distribution and Solicitation," p. 41 et seq., BNA (1967); and Bartosic & Hartley, *Labor Relations Law in the Private Sector*, pp. 35–36, ALI-ABA (1977). By the time of the Board's decision in *T.R.W. Bearings*, above, the Board's distinction between "working time" and "working hours" had attained substantial understanding, and many unions and employers had fashioned their instructions, policies, and rules in reliance on the principles and standards set forth in *Peyton Packing, Stoddard-Quirk*, and *Essex International*. We find no compelling reason to abandon those standards. The Board's decision in *T.R.W. Bearings* was an unnecessary departure from longstanding precedent and has served primarily to cause unjustified confusion and a string of nonproductive litigation. *T.R.W. Bearings* is therefore overruled[4] to the extent that it conflicts with the standards set forth in *Essex International*.

We are aware that the Board has been criticized by both management and union representatives for the instability of its rulings.[5] Unlike the unnecessary and unsettling change in policy made by *T.R.W. Bearings*, the return to *Essex International* will not require unions and employers to rewrite any existing instructions, policies, or rules and will not make any valid rule suddenly invalid. A rule made in reliance on *T.R.W. Bearings* and stating that solicitation is not prohibited on the employees' own time such as lunch and break periods will perforce be valid under *Essex International*. In overruling *T.R.W. Bearings* we are merely returning to the long-held standard that rules banning solicitation during working time state with sufficient clarity that employees may solicit on their own time.[6]

Although we do not agree with the judge's application of *T.R.W. Bearings*, we do agree with the judge's finding that the Respondent enforced unlawful rules prohibiting union solicitation by its employees. As fully set out in the judge's decision, the Respondent's rules as orally modified, as discriminatorily applied only to union solicitation, and as enforced against Betty J. Skidmore violate the Act. For these reasons, we find that the recommended Order is necessary to remedy the Respondent's violations of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Our Way, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER ZIMMERMAN, dissenting in part.

I join in my colleagues' decision today, except for their determination to overrule *T.R.W. Bearings*,[1] and their reversal of the judge's conclusion that the Respondent's published work rule 7 and the rule on solicitation and distribution in Respondent's employee handbook are unlawful.

At the outset, it bears emphasis that there is no dispute between my colleagues and me about the periods of time during the workday when an employer may lawfully prohibit its employees from engaging in solicitation and distribution activities. As a general rule, employees may engage in such activities only during those periods of the workday when they are properly not engaged in the actual performance of their work tasks—i.e., before starting work and after finishing work when properly

[4] Our decision here reflects the views expressed by Member Hunter in *Intermedics, Inc.*, 262 NLRB 1407 (1982) (Chairman Van de Water and Member Hunter concurring and dissenting).

[5] See, e.g., various comments made at the meeting of the American Bar Association's Section on Labor Law and the annual meeting of the Federal Bar Association as reported in *Labor Relations Yearbook - 1982*, BNA (1983).

[6] Our decision does not create a per se approach. Rather, we are returning to the presumptions of *Essex International*, which concern the facial validity or invalidity of no-solicitation rules and which can be rebutted by appropriate evidence. An employer could be shown, as the Respondent here was, to have unlawfully modified and applied a facially valid rule. Similarly, as the Board stated in *Essex*, 211 NLRB at 750, an employer could "show by extrinsic evidence that, in the context of a particular case, the 'working hours' rule was *communicated* or *applied* in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." [Emphasis added.]

[1] 257 NLRB 442 (1981).

on the Employer's premises, and during meal and break periods during the workday.

Nor is there any dispute between my colleagues and me about whether the restrictions on solicitation and distribution *actually imposed* by the Respondent in the instant case are unlawful. We agree that they are.

The only issue in dispute between the majority and me is whether the Respondent's rules in question, *as published*, are so broad and ambiguous that they fail to convey to employees the periods during the workday when they may legitimately engage in solicitation and distribution activities, or indeed that they improperly convey to employees that they are not permitted to engage in such activities during certain nonwork periods of the workday. In either event, the reasonably likely result of such ambiguity is to interfere with and restrict employees in the full exercise of their rights under Section 7 of the Act. My colleagues have overruled precedent, and found that the Respondent's rules are not unlawful as published; I would adhere to precedent, and find that they are.

In *T.R.W. Bearings*, the Board held that work rules which prohibit solicitation and distribution either during "working hours" or "working time" were presumptively invalid because, without more, they both were susceptible to the incorrect interpretation by employees that such activity was prohibited during *all* business hours, including periods (such as meal and break periods) when employees are properly not engaged in performing their work tasks. In this regard, *T.R.W. Bearings* partially overruled *Essex International*,[2] which held that only work rules which prohibit solicitation and distribution during "working hours" were presumptively invalid, whereas work rules which prohibit such activity during "working time" were presumptively valid. In the view of the *Essex* majority, the term "working time" connotes only the periods of time spent in the performance of actual job duties, and would "clearly convey" to employees that they were free to engage in solicitation and distribution during meal and break periods.

My colleagues are simply wrong in asserting that from 1943, in *Peyton Packing Co.*,[3] until 1981, in *T.R.W. Bearings*, above, the Board had held that rules prohibiting solicitation and distribution during "working time" were presumptively lawful.

First, the Board in *Peyton Packing* drew no distinction between the terms "working time" and "working hours." Thus:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on *company time. Working time* is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during *working hours.* Such a rule must be presumed valid in the absence of evidence that it was adopted for a discriminatory purpose.[4] [Emphasis added.]

Clearly, *Peyton Packing* can be read, from its own express terms, as support for the proposition that rules prohibiting solicitation during "working hours" are presumptively valid—a proposition to which the Board has never subscribed, and one which my colleagues and I are unanimous in rejecting![5]

Beyond my colleagues' misplaced reliance on *Peyton Packing*[6] my colleagues err in asserting that there was a 38-year history of unbroken adherence by the Board, prior to *T.R.W. Bearings*, to the proposition that rules prohibiting solicitation during "working time" were presumptively lawful. From at least 1966, in *Campbell Soup Co.*,[7] continuing through 1972, in *Avon Convalescent Center*,[8] and until 1974, when *Essex International* overruled *Avon*, the Board held precisely the opposite—i.e., that rules prohibiting solicitation and distribution during "working time" were presumptively *invalid. Campbell Soup* did not involve a single rule which prohibited distribution during "working time" and solicitation during company "working hours." Nor was the "rule" found invalid by the Board only because it used the term "working hours." Rather—and this is absolutely clear—there were two *separate* rules at issue in *Campbell Soup*: one expressed in terms of "working time," the other in terms of "working hours," each of which was found to be unlawfully broad on its own respective terms. As stated in *Campbell*, "[t]he adjective phrases 'during

[2] 211 NLRB 749 (1974) (then Members Fanning and Jenkins dissenting).

[3] 49 NLRB 828 (1943).

[4] Id. at 843.

[5] The absence of a distinction between the terms "working time" and "working hours" in the Board's *Peyton Packing* decision is further evidenced by the Board's reference in that case to meal and breaktimes as being *outside* the scope of the term "working hours," id., whereas the Board has long held, and my colleagues and I are in agreement, that meal and breaktimes are *within* the scope of the term "working hours." *Essex International*, 211 NLRB at 750.

[6] In addition to *Peyton Packing*, my colleagues also cite *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962), as setting forth standards for no-solicitation and no-distribution rules. But while *Stoddard-Quirk*, like *Peyton Packing*, is instructive on the issue of what restrictions an employer may properly actually impose on the solicitation and distribution activities of its employees, that case, again like *Peyton Packing*, is not determinative in resolving the only issue in dispute between my colleagues and me in the instant case—i.e., what express language an employer must avoid using in *conveying* to employees the restriction it is imposing on their solicitation and distribution activities.

[7] 159 NLRB 74 (1966).

[8] 200 NLRB 702 (1972).

employees' working time' and 'during company working hours' are so broad and indefinite as to embrace activities of nonworking employees during the times that others are working." 159 NLRB at 82.

Nor is today's return to *Essex* "compatible" with the Board's decision in *Avon*, as my colleagues assert. The majority in *Essex* expressly overruled *Avon* on the precise issue that divides us today—*Avon's* holding that no-solicitation rules expressed in terms of "working time" are *presumptively unlawful*. Obviously, therefore, *Essex International* and *Avon* are themselves mutually *incompatible* on the issue before us. Indeed, the one Member of both the *Essex* and *Avon* majorities recognized that his vote in *Essex* dictated a retraction of his position in *Avon*. Clearly, then, an adoption of *Essex* finds no support in *Avon*, though in struggling to embrace both, my colleagues have shown the folly of attempting to draw useful distinctions between terms of equal ambiguity. Thus, contrary to the impression my colleagues attempt to convey, the law on this issue was hardly well settled when the Board issued its decision in *T.R.W. Bearings*, partially overruling *Essex International*.

Little, if anything, need be added to the reasoning set forth in *Campbell Soup*, in *Avon*, in the joint dissenting opinion of then Members Fanning and Jenkins in *Essex International*, in *T.R.W. Bearings*, and, indeed, in the judge's decision in the instant case.[9] All demonstrate ample support for the proposition that rules prohibiting employees from engaging in solicitation or distribution during "working time," without further clarification, are, like rules prohibiting such activity during "working hours," presumptively invalid. More specifically, in *Avon*, the judge reasoned, and the Board agreed:

> "Working time is for work" is a generally accepted maxim in labor relations. It obviously connotes a time when work is actually performed, and not all of the interval between clocking in and clocking out, which may also include paid rest and meal periods and the like; and it just as obviously refers to the time the worker in question—and not any other—should be performing his work. The limited phrase "working time" by itself may be a term of art for labor relations lawyers and experts, conveying to them the full sense of the entire maxim, perhaps even in a murky verbal setting, but it is scarcely to be expected that employees will readily understand the meaning of the phrase, and regardless of the context in which it is used.[10]

[9] Sec. III,L,1(a) of the attached decision.

[10] 200 NLRB at 705.

In *T.R.W. Bearings*, the Board saw no inherent meaningful distinction between the terms "working hours" and "working time" when used in no-solicitation rules, and the Board held that:

> Both terms are, without more, ambiguous, and the risk of such ambiguity must be borne by the promulgator of the rule. Either term is reasonably susceptible to an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods). As such, either term tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights.[11]

On the other hand, nowhere in *Essex International* or in the instant case is there a clear—much less convincing—explanation of *why* employees are reasonably likely to construe the term "working hours" as *including* meal and breaktimes, and to construe the term "working time" as *excluding* such times.[12] In the understandable absence of any such explanation, I would continue to adhere to the principles that best express and protect the employees' interests, those set forth in *T.R.W. Bearings*.

[11] 257 NLRB at 443.

[12] Indeed, the only distinction is grounded in anomaly, as my colleagues single out as overly broad and ambiguous the term which actually contains the finite, measurable, discrete expression—"hours"—while they concurrently identify as clear and unambiguous the term which actually contains the infinite, unmeasured, elusive expression—"time."

DECISION

SUMMARY OF FORMER PROCEEDINGS AND STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: After an organizational campaign began in 1976 by the International Brotherhood of Firemen and Oilers, AFL-CIO (herein the Union), the National Labor Relations Board (herein the Board) issued a decision on September 20, 1978, finding that Our Way, Inc. (herein Respondent), at its various plants in Atlanta, Georgia, committed violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (herein the Act) of sufficient severity to warrant issuance of a broad order. *Our Way, Inc. Our-Way Machine Shop, Inc.*, 238 NLRB 209 (1978).[1]

On October 12, 1978, following a Board election, the Union was certified as the collective-bargaining representative of the Respondent's employees in a unit of pro-

[1] The Board found that Our Way, Inc. and Our-Way Machine Shop, Inc. comprised a single employer within the meaning of the Act (238 NLRB at 210 fn. 2).

duction and maintenance employees in the Respondent's three plants in Atlanta.[2]

After the filing of an unfair labor practice charge by the Union, a complaint issued on December 14, 1978, alleging that the Respondent had violated Section 8(a)(5) by refusing to provide information to the Union as the duly certified representative of the Respondent's employees. The Respondent denies the validity of the certification and asserts an affirmative defense based on newly discovered and previously unavailable evidence.

On December 3, 1979, the General Counsel filed a Motion for Summary Judgment which the Board, after a Notice to Show Cause and response thereto from the Respondent, granted on February 28, 1980. The Board found that, commencing about November 6, 1978, the Union had requested, and the Respondent had refused to supply, information including names of transferred employees and changes in employment and operations. The Board also found that the Respondent's objection to the certification was an attempt to relitigate issues previously determined in the absence of newly discovered or previously unavailable evidence or special circumstances. Accordingly, the Board concluded on February 28, 1980, that the Respondent had violated Section 8(a)(5) and (1), and ordered the Respondent to supply the requested information and bargain with the Union.

On September 23, 1980, in Case 10-UC-109, the Union (the Petitioner therein) filed a unit clarification petition which sought to include in the unit a plant of the Respondent (the Employer therein) at Tucker, Georgia. The Employer (the Respondent herein) filed a motion to dismiss the petition on grounds that it was filed only after the Union had allegedly failed to organize the Tucker employees. On November 17, 1980, after a hearing, the Regional Director for Region 10 issued a Decision and Clarification of Bargaining Unit in which he found that the employees at the Tucker plant were an accretion to the previously certified unit and that the unit designation should be clarified to reflect this fact. On the filing of a request for review by the Employer (the Respondent herein), the Board affirmed the Regional Director's decision on March 11, 1981.[3]

Coming now to the instant proceeding, the Union filed the charge in Case 10-CA-16207 on September 2, 1980, and complaint issued on October 10, 1980, alleging that the Respondent, at its Tucker plant, coercively interrogated employees, promulgated a rule prohibiting solicitation during nonworktime in violation of Section 8(a)(1), and discriminatorily discharged employee Betty J. Skidmore in August 1980 in violation of Section 8(a)(3) and (1). As amended at the hearing, the complaint further alleges that the Respondent, since March 6, 1980, maintained a rule prohibiting soliciting, collecting, or selling for any purpose during working time and, on July 13, 1981, distributed a booklet prohibiting: (1) solicitation of any kind or distribution of literature of any kind during working time, (2) the same activities by an employee on nonworking time, (2) the same activities by an employee on nonworking time directed toward one who was working, and (3) distribution of literatures at any time in working areas.

On September 30, 1980, Alex Smith, an individual, filed the charge in Case 10-CA-16288, and complaint issued on November 6, 1980, alleging that the Respondent, at its Tucker plant, solicited employee grievances for the purpose of causing its employees to reject the Union, threatened employees that it would close the plant if they selected the Union as their bargaining representative, and promulgated an unlawful solicitation rule as described above, all in violation of Section 8(a)(1).

The Union filed an original, an amended, and a second amended charge in Case 10-CA-16742 on March 4, April 20, and April 30, 1981, respectively, and a complaint issued on May 4, 1981. It alleges that the Respondent began operations at its Tucker facility in January 1978, that the unit as clarified constituted an appropriate unit for collective bargaining, that the Respondent unilaterally altered its policy on absenteeism and tardiness in such unit, and that it discharged employee Larry Grier about February 10, 1981, for violation of such altered rule, all in violation of Section 8(a)(5) and (1).

The Union filed the charge in Case 10-CA-16809 on March 24, 1981, and complaint issued on May 8, 1981, alleging that, beginning about September 25, 1980, the Union requested the Respondent to bargain with it as the representative of the Respondent's employees in the clarified unit, and that the Respondent refused in violation of Section 8(a)(5) and (1).

The Union filed the original and an amended charge in Case 10-CA-17089 on June 12 and July 9, 1981, respectively. A complaint issued on July 10, 1981, alleging that the Respondent, at its Tucker plant, coercively interrogated its employees and threatened them with discharge because of their activities on behalf of the Union in violation of Section 8(a)(1).

A hearing was conducted before me on these matters in Atlanta, Georgia, on July 27 through 30 and August 17 and 18, 1981. On the entire record, including briefs filed by the General Counsel, the Respondent, and the Charging Party, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Georgia corporation with an office and places of business at Atlanta and Tucker, Georgia, where it is engaged in the manufacture and sale of machinery. During calendar year 1980, a representative period, the Respondent sold and shipped finished products valued in excess of $50,000 from its Atlanta and Tucker, Georgia plants directly to customers located outside the State of Georgia. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[2] Jt. Exh. 1. The plants were located on Bernina, Krog, and Elizabeth Streets. The Bernina Street facility was closed in 1977 and the Krog Street plant in June 1979, with the operations of the latter relocated to a new plant in Tucker, Georgia. The Respondent's only remaining facility in Atlanta was on Elizabeth Street.

[3] Jt. Exh. 1.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The First Two Bargaining Sessions*

The pleadings establish that the Respondent began operations at its Tucker plant in January 1978. As noted above, the Board, on February 28, 1980, ordered the Respondent to supply the information requested by the Union and to bargain with it. A few days later, on March 4, the Union's International vice president, Jimmy L. Walker, sent the Respondent's attorney, William F. Ford, a letter in which he "again" requested names of employees who had been transferred, laid off, or recalled, and any changes in wages, employment, and operations. Ford sent information in response, and testified that he had a conversation with Walker in which he expressed doubt about the precise nature of Walker's demand. When Walker replied that he wanted information on employees transferred to Tucker, Ford replied that he did not see how Tucker was involved, since the certification was limited to the three Atlanta plants. Ford asserted a later conversation with Walker in which the latter requested a bargaining session "for Elizabeth Street." Ford replied that he was not sure "where we are insofar as the Tucker issue is concerned," but agreed to a session on the Elizabeth Street plant.

The first meeting took place on April 24, 1980. International Representative Eugene E. Heinz was introduced by Walker as the Union's principal negotiator, while Ford represented the Respondent. Heinz requested additional information, including names of employees transferred to the Tucker location, and Ford replied that he was not there to discuss Tucker "in any way, shape, form or fashion." The Respondent amended its answer at the hearing so as to admit that it refused to bargain about Tucker. Ford agreed to supply information, and this was furnished to the Union the following day. The Union agreed to submit a proposal and subsequently did so on May 12.

The second session took place on May 23, 1980. Heinz and Ford again were the principal negotiators. Heinz again requested bargaining about the Tucker plant and Ford again rejected this request. The Union's proposal was reviewed and Ford submitted company counterproposals on noneconomic issues.

B. *The Respondent's Change in Disciplinary Policy*

The Respondent had written guidelines for discipline of employees because of absenteeism since at least June 1978. The absences were rated according to the nature of the excuse, or the absence thereof, with "counts" or demerits given to each offense according to its gravity. Specific discipline was then prescribed as an employee reached a certain number of demerits—verbal counsel for 32, a written warning for 48, a final written warning for 64, and discharge for 80 "counts."[4]

On June 1, 1980, the Respondent issued a confidential memorandum, effective July 1, reducing the number of "counts" required before a specific level of discipline would be imposed. In addition, guidelines for disciplining probationary employees were instituted.[5] The Respondent estimated that this policy was 15 percent more stringent than the prior system.[6]

C. *The Next Five Bargaining Sessions—The Agreement on Work Rules and the Respondent's Failure to Supply the New Rule on Progressive Discipline*

The third meeting was held on June 19. The Respondent presented a number of noneconomic proposals, including an increase of the probationary period from 90 to 180 days, during which time the employee would not have recourse to the grievance and arbitration machinery of the proposed agreement.[7] In the absence of evidence that the same change was made at Tucker, the result would have been a probationary period twice as onerous for Elizabeth Street employees as for those at Tucker. The Company also proposed that seniority be accrued only on the basis of service at its Elizabeth Street plant and that it be limited to that plant.[8] This would have permitted the Respondent to destroy accrued seniority in either plant by transferring an employee to the other plant. The Company also proposed a management-rights clause which gave it the right to rescind or change company rules.[9]

At the June 19 meeting, Union Representative Heinz demanded copies of all rules and regulations governing employees for which it was the bargaining agent. He also informed Ford that the Union was beginning a membership drive at the Tucker plant. Ford relayed this information to Company President Bobbie Bailey, who testified that she learned about it in August.

The parties met for the fourth time on July 1 and noneconomic proposals were exchanged. On August 7, the fifth session, Heinz told Ford that he had not yet received copies of the rules which he had previously requested.

During the sixth meeting, the next day, Heinz told Ford that the Tucker campaign was proceeding satisfactorily. Ford gave Heinz copies of various company rules, including one entitled "Absences" (G.C. Exh. 5), but did not give him the new confidential rule on progressive discipline for absenteeism (G.C. Exh. 3). Heinz testified at the hearing that he "never" saw this latter document, while Union Representatives Allen Pitts and Legusta Foster also said that they knew nothing about it.

The Respondent's first public disclosure of the new procedure came in the form of a letter to a Board agent on November 3, 1980, in connection with investigation

[4] G.C. Exh. 20.
[5] G.C. Exh. 3.
[6] G.C. Exh. 13.
[7] G.C. Exh. 19(c).
[8] G.C. Exh. 19(d).
[9] C.P. Exh. 1; testimony of Heinz

of the charge in Case 10-CA-16288. This letter informed the Board that employees had not been informed about the new policy, because, if they knew "exactly how many absences they could accumulate before being discharged, the result would be that many employees would tend to increase their absences and approach the maximum, knowing that they would risk discharge only if they exceed the maximum" (G.C. Exh. 14).

The Respondent argues in its brief that Heinz never asked for a definition of excessive absenteeism, and thus appeared to submit to management's administration of the rule. It also argues that the General Counsel knew of the new policy from the Respondent's November 3 letter and that the General Counsel "admitted" informing the Union of the new guidelines. In fact, the record discloses that counsel for the General Counsel was arguing that the new rule was "concealed from the Union" until the Board's investigation of one of the charges. In the course of this argument counsel commented that "the only evidence that the Union knew about these unilateral acts comes as a result of the Board informing them." However, Heinz and other union representatives, as noted, denied ever seeing the document.

The Respondent's contentions are specious. Beginning in June, Heinz repeatedly asked for copies of all rules, and the Respondent's argument that the union negotiator did not ask for a specific definition of excessive absenteeism is not convincing. With respect to the Respondent's November 3 letter to the Board agent, general language in the General Counsel's argument on a motion is not as significant as the specific denials of knowledge from the union representatives. In any event, an employer's letter to the Board, in response to an unfair labor practice charge, does not constitute performance of the same employer's duty, 5 months earlier, to disclose relevant information to a designated collective-bargaining representative. The evidence thus shows and I find that knowledge of the new rule was not disclosed to the Union, despite the latter's request for same.

During the seventh meeting, on August 20, the parties agreed to an amendment of the Company's management-rights clause proposal which obligated the Company to provide the Union "with copies of changes in rules which the Company elects to reduce to writing."[10] Nonetheless, the Respondent did not provide the Union with a copy of its new written rule on progressive discipline for absenteeism.

D. *The Union Campaign at Tucker and the Respondent's Reaction*

1. The campaign in August 1980—Betty J. Skidmore

One of the leaders of the campaign at Tucker was Betty J. Skidmore, who had been an employee at Elizabeth Street since late 1976 or early 1977 and was transferred to Tucker in January 1978. Her 1977 performance evaluations showed that she was "substandard but making progress" (G.C. Exhs. 11(a), (b), and (c)). She became a "satisfactory" employee in 1978 and a "very good" employee in 1979 and early 1980 (G.C. Exhs. 11(e), (f), and (g)).

Skidmore signed a union card and began attending union meetings in August 1980. She met International Vice President Jimmy Walker at one of these meetings in mid-August, and received instruction from him in the method of soliciting authorization cards. According to the consistent and credible testimony of Skidmore and Walker, the latter told the employees at the meeting that solicitation could not take place during working time and that the Company had fired several employees for violating this rule during the campaign at Elizabeth Street. Skidmore thereafter spoke to fellow employees about the Union and obtained about 25 signed cards. She testified that she did so only during nonworking time.

2. The no-solicitation rules and Bailey's speeches on August 22, 1980

a. *The no-solicitation rules*

The Respondent, at material times, maintained "Work Rule 7," which prohibited "soliciting, collecting or selling for any purpose during the working time of the soliciting employee or the working time of the employees being solicited."[11]

The Respondent also distributed a handbook to employees in mid-July 1981, reading in part as follows:

> SOLICITATION/DISTRIBUTION—In order to prevent disruption in the operation of the plant, interference with work and inconvenience to other employees, solicitation for any cause, or distribution of literature of any kind, during working time, is not permitted. Neither may an employee who is not on working time, such as an employee who is on lunch or on break, solicit an employee who is on working time for any cause or distribute literature of any kind to that person. Whether on working time or not, no employee may distribute literature of any kind in any working areas of the plant.[12]

b. *Bailey's speeches*

1. Summary of the evidence

As previously noted, Company President Bailey learned about the union campaign from Ford. Askham gave Bailey a card in August, obtained from an employee, and told her that there were "lots of cards" in the plant. On August 22, Bailey had a meeting with Ford,

[10] G.C. Exh. 19(h).

[11] Work rule 7, G.C. Exh. 4. The work rules were identified as applying to the Respondent's employees by Charlotte Finley, the Respondent's personnel manager. In the first proceeding, the administrative law judge considered a rule which prohibited "soliciting, collecting or selling for any purpose during working hours," and citing *Essex International*, 211 NLRB 749, 750 (1974), found it to be prima facie invalid, and that the Respondent had not shown that it conveyed to employees the fact that they could engage in solicitation and distribution during nonworking time. *Our Way, Inc.*, supra, 238 NLRB 209, 214-215 (1978). A Board panel affirmed this conclusion, Member Penello without comment, Member Truesdale without passing on the issue, and Chairman Fanning with qualification (id. at 238 fn. 3). As indicated above, the prohibition in this case applies to "working time" rather than "working hours."

[12] G.C. Exh. 15, p. 18.

and then held a series of meetings with employees, with Ford and Askham present. The latter testified that Bailey "read" work rule 7 to the employees and "further elaborated" as to what it meant. The same thing was said in each meeting, according to Askham. Bailey, however, testified that she did not read from a prepared script, and that her remarks varied from group to group. She held up one of the authorization cards, read it to the employees, and told them that they had a right to join the Union, but also had a right to work without a union. Bailey averred that she quoted the Respondent's work rule 7 and "told" the employees that they *could* solicit during breaks, lunch periods, and before and after work. The company president asserted that she had a copy of an authorization card and rule 7 at every employee meeting.

Charles Askham testified that Bailey told the employees that the Company believed there was a union organizing campaign, that she held up a union card and said that the employees had a right to be represented by a union, but also a right not to be represented. The company president also read work rule 7 and "further elaborated" that it meant employees could not solicit during worktime.

The General Counsel presented four witnesses on the subject of Bailey's speeches.[13] Skidmore testified that Bailey did not have rule 7 at the meeting which Skidmore attended, but that the company president referred to the rule and said it meant "No soliciting." (Bailey denied saying this.) According to Skidmore, Bailey also said that the Union was "no good," and that she thought she had left all that behind her at Elizabeth Street. The Union could not give the employees anything and she had given them everything they had. Skidmore testified that Bailey said work rule 7 required "firing" if an employee engaged in soliciting on the job.

Alex Smith is a former employee who was fired on September 29, 1980. He testified about a meeting "around" September 19. The company president held up a union card and said that there would be no union at Tucker, that she was the employees' representative, and that all the Union wanted was the employees' money. She had nothing to do with Elizabeth Street since that plant was for the Union and she would shut down the Tucker plant before she would let the Union come in and take over. On direct examination, Smith testified that Bailey also said there would be no soliciting on company property and that was "all" she said on that subject. On cross-examination, Smith denied that Bailey *read* a work rule, but acknowledged that his pretrial statement said that she did. However, Smith continued to maintain on further cross-examination that Bailey said, "As stated in the work rule, there would be no soliciting." The witness acknowledged seeing Bailey with a union card, but denied seeing a copy of the work rules.

Employee Sandra Banks was present at one of the meetings, which she said took place "around August 29." Bailey had a list of rules and referred to rule 7, according to Banks. Banks could not recall whether Bailey actually read the rule. All that the witness could remember is that Bailey said there would be no soliciting on her property.

Employee Betty Cammon testified on direct examination that she attended a meeting in the break room and that Bailey said that anyone soliciting or caught passing out union cards would be fired. Bailey also said that employees would sign away their rights by signing a union card, that the Union could not do anything for employees, and that it could not compel Bailey to do anything for them. On cross-examination, Cammon agreed that Bailey "read" work rule 7 and testified that "she made a point to say something [sic] Rule 7 . . . ." That was "all" Bailey said about no-solicitation, Cammon affirmed in response to a leading question.

On redirect examination, the witness repeated her original version and added that Bailey did not say anything about breaktime or worktime. The company president did not read work rule 7 "word for word," according to Cammon. She said, "No one caught soliciting during the working hours or in your working area, you know . . . no one caught soliciting during your working hours during your break area. If they did, they would be fired for passing out union cards."

2. Factual analysis

There is nothing in the language of work rule 7 which states the time when an employee *is permitted* to solicit. Bailey herself testified that she did not read from a prepared script and that her remarks varied from group to group. Askham testified that Bailey "elaborated" on the meaning of the rule. I conclude that Bailey may have read the rule or parts of it in some of the meetings, but that she also gave her interpretation of its meaning.

The Respondent argues that the testimony of the General Counsel's witnesses contradict each other and, considered separately, are internally inconsistent. As to the first argument, Bailey did make different speeches and admitted that they were not the same. It should not be surprising, therefore, that the versions of the speeches are different. Although Banks and Smith did not know the exact date of Bailey's speeches, their testimony clearly referred to speeches made by Bailey on August 22.

I have carefully examined the record and conclude that the Respondent's contentions with regard to internal inconsistencies are for the most part clarifications of prior testimony. Thus, Skidmore first testified that Bailey said employees would be fired if they solicited. The witness then corrected this: "Well, she [Bailey] didn't say it. She said Article 7. She never did state what it mean [sic] but she said she thought it meant no soliciting on the job, that you would get fired." This is a clarification rather than an inconsistency, with the witness meaning that Bailey said *work rule 7* required discharge in the event of soliciting on the job.

The Respondent points to Banks' indecision as to whether Bailey "read" the rule, or "read off of it," and to the fact that Banks "didn't pay too much attention to it." Given these inadequacies of the witness, Banks did testify that "the only part [she] heard was that there would be no soliciting on her [Bailey's] property." Although a witness' statement that she does not remember

[13] See discussion of Willie Gresham's testimony, infra, fn. 14.

everything about a speech has some bearing on her memory, it is insufficient ground for rejecting her testimony as to those parts which she does remember. Few witnesses are endowed with total recall.

The Respondent argues that Cammon "recanted" her original testimony on cross-examination and then attempted to give still another version on redirect examination. Cammon's testimony on redirect is not entirely clear. Although portions of his testimony indicate that Bailey used terms such as "working hours" and "break area" (sic), in other portions of her redirect examination Cammon explicitly denies that Bailey used the terms "break time" or "work time." This latter testimony is consistent with Cammon's statements on direct examination and with the testimony of the other three witnesses summarized above, which recite only Bailey's flat prohibitions, in various forms, against soliciting. I, therefore, conclude that a fair summary of Cammon's testimony is the one given on direct examination—Bailey said that anyone soliciting or caught passing union cards would be fired.

Although there are some differences in the employees' testimony, there is a common element in that each of them testified that Bailey's interpretation of the rule was a flat prohibition.[14] This common element and the honest demeanor of these witnesses give their evidence greater probative weight than the general denials of Bailey and Askham. The Respondent argues that Skidmore's testimony should be discounted because she is an alleged discriminatee and, therefore, has a personal interest in the matter. This observation does not apply to Cammon and Banks, however; each is a current employee of the Respondent. It is well established that "the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken." *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979).

For these reasons, I find that Company President Bailey on August 22 told different groups of employees that work rule 7 meant "No soliciting," or "No soliciting on company property" and/or that any employee caught soliciting or soliciting on the job would be fired. I also find that Bailey told employees that the Union was "no good," that it could not do anything for employees, that Bailey had given them everything they had, and that the Union could not compel her to give them anything. Bailey further told employees that there would be "no union" at Tucker, that she left all that behind her at Elizabeth Street, that all the Union wanted was the employees' money, and that she would shut down the Tucker plant before she would let the Union come in.

3. Actual solicitation in the Respondent's plants

An overwhelming mass of credible testimony from a variety of witnesses establishes the fact that many activities went on in the Respondent's Atlanta and Tucker plants during working time that had nothing to do with the Company's function of manufacturing and selling machinery. Company employees engaged in various enterprises for personal profit, such as catalog sales of Tupperware, flowers, pens, candy, soap, aprons, clothing, watches, and rings. Money was raised for charitable purposes such as assistance to hospital patients, fire victims, and survivors of recent decedents. Social and religious events such as Thanksgiving, Christmas, and birthday parties were financed by collection activities on the part of the employees. There was even a thriving activity in betting on football games and other sporting events.

This activity took place in all areas of the plant, including working areas, and during both working and nonworking time. Supervisors engaged in such activity themselves and condoned such activity on the part of employees, while some of the latter were acting on behalf of supervisors. Betty J. Skidmore took part in such activities, without criticism from management.

Despite these activities, Askham admitted on cross-examination that the only discipline and the only discharge of employees for solicitation in the Company's history had been the result of union solicitation, and that the only time it called an employee meeting about solicitation was when it learned of the Union's organizational campaign. Askham was unable to explain why solicitation warranted discharge for a first offense, unlike other offenses in its progressive discipline system.

4. The discharge of Betty J. Skidmore

a. *Summary of the evidence*

On August 29, a week after Bailey's speeches, Skidmore was called into Charles Askham's office.[15] Skidmore testified that Askham said that he had heard she was involved with the Union and asked whether she had been handing out any union cards. "Not while I was working," she replied. Askham then questioned whether Skidmore had distributed cards during breaks and Skidmore answered, "Maybe." The plant manager asked the same question with regard to lunch periods and got the same answer. He then queried, "Well, you sure you ain't

[14] Employee Willie Gresham was presented by the General Counsel on the subject of general solicitation and sales of products in the Respondent's plants. During cross-examination and over the General Counsel's objections, the Respondent was permitted to ask Gresham questions about what Bailey said about solicitation. Asked whether he had "ever been told that [he] shouldn't be soliciting on working time," Gresham replied: "Ms. Bobbie [Bailey] had a piece of paper and she just raised up and said there would be no soliciting on the job." On being shown his pretrial statement, Gresham agreed that he then stated that Bailey told employees "not to sell anything on her time," but explained that this statement was "later on." I expressed doubt about Gresham's capacity to understand his affidavit. The Respondent relies on parts of Gresham's testimony and attacks others.

I have not relied on Gresham's testimony in making the findings noted above. However, since the Respondent raised the subject of Gresham on cross-examination, I credit the latter's testimony that Bailey raised a piece of paper and said there should be no soliciting on the job and I note that this testimony is consistent with the other evidence that Bailey had work rules and an authorization card during her speeches. I also credit Gresham's testimony that Bailey "later on" said there should be no *selling* on her time, and infer that this incident was unrelated to her speeches about *union* solicitation on August 22, both in time and subject matter.

[15] The pleadings establish that Askham was a supervisor within the meaning of the Act, as the Board found in the first proceeding (209 NLRB at 211 fn. 9), and I again make the same finding.

got anything to say before I take further action?" Skidmore replied in the negative.

Skidmore was called back in Askham's office a second time that day. According to her testimony, Askham told her that she had "been charged with Section 7, talking union in someone else's working area." After Skidmore again said she had nothing further to say, Askham discharged her.

Askham testified that "Personnel" told him that another employee, Tammy Bowman, complained that Skidmore had "harassed or intimidated" Bowman at the latter's work station. Askham then called Skidmore into his office and said that she had been accused of soliciting signatures on union cards at another employee's work station, in violation of the Company's no-solicitation rules. Askham then "restated" the accusation as one involving working time, and Skidmore left after having nothing further to say.

Askham then went to the personnel department, where a statement had already been obtained from Bowman. In the statement, Bowman avers that Skidmore came to Bowman's work station on August 23 during working time and gave her a union card wrapped in a napkin. Further, according to the statement, Skidmore on succeeding days again asked Bowman to sign, while both were in the bathroom.[16] Askham testified that he asked Bowman whether the latter's statement was true and that she affirmed that it was. He also asserted that Bowman told him she wanted to quit because of Skidmore's "harassment." Askham did not ask Bowman how much time Skidmore spent with the latter when she passed the union card in a napkin.

Askham further testified that he called Skidmore back a second time and told her that he had had no problem with her solicitation during break or lunchtime, but that working time was a violation of the rule and that it was necessary for him to discharge her. Her termination notice states that she was an "above average" employee in four categories and an "average" employee in one, but that she was terminated for violation of work rule 7—"Soliciting." The notice states that she was given a prior warning, but there is no other evidence of this (G.C. Exh. 11(h)).

Askham had instructed his secretary to take notes of these conversations. Skidmore did not know this fact, because the secretary was in an adjoining room. The purported notes are written in longhand and are not as replete with detail as the testimonial versions.[17] The secretary, Francine Griner, testified that the original notes had been taken in shorthand, but that she transcribed these into longhand and destroyed the original notes.

Bowman testified that Skidmore gave her a union card in a napkin during working time. Bowman could not remember the date. She testified originally that Skidmore asked her to sign the card, but then said she was not sure what Skidmore said. Bowman averred that she told Skidmore that they would be fired for doing this during working time, whereon Skidmore asked her to sign it in the bathroom. Bowman said she would sign it at home, but instead threw it away. Bowman also testified that Skidmore was at the former's work station a few minutes, but a demonstration of the witness' perception of time at the hearing indicated that the alleged incident could not have taken more than 1 minute. Bowman testified that she did not stop working during this conversation, and that this was the only time Skidmore spoke to her except for solicitation in the bathroom. Bowman thereafter reported the matter to her supervisor and was asked to sign a statement.

Bowman said she worked for the Respondent for about 1 month and then was fired for absenteeism. She testified that she could not remember the date she was hired or the date she was fired, and was vague on whether she had been warned about absenteeism before giving her statement. Bowman averred that the Respondent offered to rehire her on the same day she was fired, but did not know the reason or the individual who told her this.

Skidmore denied handing out union cards during working time or asking other employees to sign cards during such time. She acknowledged solicitation for the Union in the restroom, but testified that this was considered to be nonworking time. Also, as noted, Skidmore participated with the other employees in the general solicitation of various products and fund-raising activities during working time.

b. *Factual analysis*

I credit Skidmore that Askham asked her during the first conversation whether she had been handing out union cards. This is partially corroborated by Askham's original testimony that he told Skidmore she had violated company rules by "talking union in someone else's working area." It is clear that Askham's original statement was that Skidmore had violated the rules by engaging in union activity—without any qualification, according to Skidmore, or in another employee's working area without any qualification as to working time, according to Askham.

I also find that Skidmore replied that she had not done so on working time and that Askham then asked her whether she had done so on nonworking time such as breaks and lunch periods.

According to Askham's own testimony, he misstated work rule 7 the first time he spoke to Skidmore by saying that it prohibited solicitation at another employee's work station. I give little or no probative weight to the secretary's notes saying that Askham incorporated the phrase "working time" into his initial statement, because (1) the notes conflict with Askham's testimony, (2) they are not the original shorthand notes which Griner says she took, (3) Griner herself admitted that she did not take down everything that was said, and (4) the notes obviously do not reflect the entirety of Askham's conversations with Skidmore. The notes do, however, corroborate Skidmore's testimony that she denied solicitation during working time.

[16] R. Exh. 2.

[17] According to the notes, Askham said during the first conversation that Skidmore had been soliciting during worktime. "Betty: 'Nothing.'" "Betty: ?" Askham said that he wanted to hear Skidmore's side before any action, and the employee said she did not recall distributing during working time. "That's all," Askham said. The account of the second conversation is similar to Askham's testimony (R. Exh. 3).

Askham's testimony about his initial call from the personnel department is suspect. He said that he received a report of employee harassment or intimidation by Skidmore, but there is nothing in this asserted report about union activity. And yet Askham, prior to his visit to the personnel department, immediately called in Skidmore and told her that she had been accused of violating the Company's no-solicitation rule. How did Askham know this, prior to his visit to the personnel department, his reading of Bowman's affidavit, and his interview with the latter? I infer that Askham had knowledge of the nature of Bowman's accusation prior to his first conversation with Skidmore and, accordingly, that his testimony about the report from the personnel department is not candid and complete.

Because Askham was thus a less reliable witness than Skidmore, I credit her testimony about the second conversation with the plant manager. Askham claims that he "restated" the rule so as to incorporate working time, during the first conversation. I do not credit this testimony, and accept Skidmore's version. Askham obviously did not know the rule or misstated it during the first conversation and, according to Skidmore's testimony, he still had it wrong in the second conversation, after coming back from the personnel department.

Bowman was an incredible witness. Her testimony has contradictions and improbabilities which make it unbelievable. Her appearance and demeanor were not that of a truthful person. I reject both her testimony and her pretrial statement as complete fabrications. Even if Bowman's testimony were accepted, it establishes only that Skidmore took less than 1 minute of working time to give Bowman a union card while the latter continued working, and said something which Bowman could not remember. As between this scintilla of evidence that Skidmore engaged in a fleeting violation of work rule 7, and Skidmore's adamant denial that she ever did so, the probable truth lies with Skidmore, and I credit her denial.

E. *The September Bargaining Sessions and the Unit Clarification Petition*

The parties met on September 9, 1980, for the eighth time, and the Respondent made various proposals. Thus, it submitted a proposal that wages be continued at existing rates,[18] and that the same holidays be granted with the addition of Christmas Eve during the second year of the contract.[19] One day of funeral leave without pay was offered.[20] The Company proposed that it have the right to schedule employee vacations according to company needs, and that earned vacation rights be forfeited if not taken within 12 months after having been earned.[21]

On September 23, the Union filed its unit clarification petition, as noted above, so as to include employees at the Tucker plant.

Heinz testified that, during the Tucker campaign, the Union learned that more employees had been transferred to Tucker from Atlanta than had been indicated by the Respondent. The parties met again for the ninth time on September 25. Heinz informed Ford of the filing of the unit clarification petition, and again demanded bargaining on behalf of the Tucker employees. Ford refused. Heinz asked for a complete and accurate list of all transferred employees, and Ford told the union negotiator to have (International Vice President) Walker "put it in writing."

F. *The Respondent's Wage and Fringe Benefit Increases Only to Tucker Employees and the Union's Reaction*

The Respondent's practice since about 1962 to 1979 was to give annual wage fringe benefit increases to its employees based on a survey of labor market conditions. The wage increases were the same for employees doing the same job in all of the Respondent's plants except for probationary employees, who received less than regular employees.[22] There were two increases in 1979.[23]

This continued to be the Company's policy through the early part of 1980, and the wage committee then discussed the amounts of wage raises for all employees, according to Askham. However, when negotiations with the Union began, the Respondent decided that raises for the Elizabeth Street employees would be handled through the negotiations. This was the first time that the Respondent had benefit increases to employees at only one of its plants.

On August 19, about the time Bailey learned of the union campaign at Tucker, and just before her speeches to Tucker employees, the Respondent posted a notice on Tucker bulletin boards stating that the 1980 increase would be in November.[24] On November 14, the Respondent granted only to Tucker employees a 50-to-55 cent hourly increase,[25] a new holiday on Christmas Eve, a 3-day funeral leave for nonprobationary employees, and a reduction in the requirement for a 2-week vacation from 3 to 2 years of service.[26] Three days later, on November 17, the Regional Director issued his decision clarifying the unit so as to include the Tucker employees, as described above.[27]

Legusta Foster, an Elizabeth Street employee and a member of the Union's negotiating team, obtained a copy of the Respondent's announcement of the November increase at Tucker, and gave it to union negotiator Heinz. Foster testified that the reaction of the Elizabeth Street employees to the news was "terrible," and that they were going to "beat up" (International Vice President) Walker about the "raise [they] didn't get." Walker testified that he met with a group of these employees, who

[18] G.C. Exh. 19(m); testimony of Heinz
[19] G.C. Exh. 19(k); testimony of Heinz
[20] G.C. Exh. 19(j).
[21] G.C. Exhs. 19(i), 19(l).
[22] Testimony of Askham.
[23] G.C. Exh. 16(b).
[24] Ibid. The notice is addressed to "All Plant Employees" on the subject of "Annual Pay Increase Plant Employees," and states: "A number of employees have asked about our annual wage increase. In 1979, you will recall we had two pay increases, one in April 1979 and the last one in November 1979. Our 1980 annual plant increase will be in November 1980."
[25] Employees earning $5 hourly or more received a 55-cent raise, while others received 50 cents.
[26] G.C. Exh. 16(c); testimony of Askham.
[27] Jt. Exh. 1.

told him that the Tucker employees were going better than they were, that they did the "wrong thing" joining the Union, and that Walker had "sold out" to the Company.

G. *The Final Bargaining Sessions—the Respondent's Rejection of the Unit Clarification Decision*

The 10th bargaining session took place on December 4, 1980, at which time there were "fireworks" according to Heinz, who had received a "verbal assault" from Legusta Foster that morning over the Tucker increases. Heinz opened the session by asking when the Elizabeth Street employees would get the same increases as those received by the Tucker employees, and Ford said that he was not aware of them. Heinz then showed Ford the Company's announcement of the Tucker increase, which Heinz had received from Foster. The company representative responded by saying that the Union would file a charge over a unilateral change if the Company gave the same benefits to the Elizabeth Street employees, and Heinz replied that the Union would waive all such rights in return for the same benefits. Ford refused, saying that any increase at Elizabeth Street, as well as retroactivity of increases, had to be the result of negotiation. He asked whether granting Elizabeth Street the same benefits would result in a contract, and Heinz replied in the negative.

The union negotiator again demanded bargaining over the Tucker employees, and noted that the Regional Director's unit clarification decision had included them. Ford replied that this was not the Board's decision. After a caucus, the Company offered 1 day of paid funeral leave, which the Union accepted, and Christmas Eve holiday in the second year of the contract, which the Union rejected.[28] Ford also proposed a 10-cent hourly increase for each year of a 3-year contract, which the Union rejected.[29]

The 11th bargaining session took place on January 6, 1981. Heinz again demanded bargaining over the Tucker employees. Ford replied that he had appealed the Regional Director's decision to the Board, and was not going to bargain over the Tucker employees until the Board issued its decision. The Union contended that any conclusions reached at Elizabeth Street would automatically apply to Tucker, and Ford replied that he would have to wait and assess the circumstances when the Board issued its decision, at which time he would decide what action to take.

The parties had their 12th meeting on January 22, 1981, and reached agreement on the Union's proposal for a management-rights clause, but the Company again rejected the Union's position on the bargaining unit. Heinz asked for a final offer to take back to the Elizabeth Street employees, but Ford refused "to go out on a limb" and take any final position.

As noted above, on March 11, 1981, the Board issued its order affirming the Regional Director's unit clarification decision. The parties met for the last time 5 days later, on March 17. Heinz demanded that the Company honor the Board's order and bargain over the Tucker employees. Ford refused, saying that he did not agree with the Board's order.

H. *The Discharge of Larry Grier in February 1981*

Grier had been an active and overt supporter of the Union in the original campaign, and was discriminatorily discharged on October 12, 1976, in violation of Section 8(a)(1) and (3), together with other union adherents. The reason then asserted by the Company for discharging him was that he was "harassing employees and interfering with production," a reason which the Board found to be pretextual. *Our-Way, Inc.*, supra, 238 NLRB 209, 226.

The complaint in Case 10-CA-16742 alleges that the Respondent violated Section 8(a)(1) and (5) by unilaterally altering its rules on absenteeism and tardiness, and by discharging Grier again on February 10, 1981, because he violated the changed rules. The Respondent's answer admits that Grier was discharged about the alleged date, but denies that it altered its rules or that Grier was discharged for violation of same. Further, the answer alleges that Grier was reinstated on May 5, 1981. Grier testified that he was reinstated after his second discharge, but that he was not paid any backpay.

It is clear, as described above, that the Respondent changed its rules on absenteeism and tardiness by a confidential June 1 memorandum which became effective on July 1, 1980, and that it did not inform the Union of this fact. It is further obvious and I find that Grier was discharged again on February 10, and reemployed without backpay on May 6, 1981. With respect to Grier, therefore, the only issues are whether his second discharge violated the Act and, if so, whether he is entitled to backpay.

Grier testified that he became ill the day before his second discharge and notified his supervisor. The latter said that he could not permit Grier to see a doctor. Grier nonetheless was ill the next day, saw a doctor, and called his supervisor. According to Grier's uncontradicted testimony, the supervisor told Grier that he knew he was sick from the tone of his voice, but nonetheless had to terminate him. The supervisor gave no reason, and Grier could not recall any conversation about absenteeism.

The Respondent contends that Grier was discharged because of its tightened "no-fault" rules on absenteeism and tardiness, but that it reinstated him when the Board alleged that its unilateral change of rules violated the Act. However, the Respondent further argues, Grier would have been discharged at an earlier date under the old rules and, accordingly, his second discharge was not *because of* his violation of the new rules. The Respondent therefore concludes that Grier is not entitled to backpay. These arguments require detailed examination of the old and new rules.

The old rules are set forth in the General Counsel's Exhibit 20, and were effective June 27, 1978. They describe the number of "hours" attached to various types of absences, and the "code" for each type, as follows:

[28] Jt. Exh. 2.

[29] Testimony of Ford and Heinz.

Absences

Code	*Type of Absence*	*Count/Hrs.*
1	With No Report	8
2	Due to Illness	4
3	Personal Business	4
4	Due to Disability w/ Doctor's Note	2
5	Partial Day	2
6	Tardy	2

As partially described above, the progressive discipline utilizing these "counts" extended from 32 to 80, the latter requiring discharge. According to Personnel Manager Finley, the new rules are contained in the General Counsel's Exhibit 3, which is a copy of the Respondent's "Confidential" guidelines dated June 1. The first four types of absence, their code ratings, and the "counts" assigned to them are the same as under the old rules. The fifth type, a "partial day" under the old rules, is defined as "Partial Day (over 2 hrs. lost)" under the new rules, and the same two "counts" (or "hours") are assigned. The sixth kind of absence, called "Tardy" under the old rules, is renamed "Partial Day (under 2 hrs.)" in the new rules, and the penalty is reduced to one "count."

Finley testified that the only difference between the old and new rules was dropping the penalty for partial days or tardiness from two counts to one, and reducing the entire schedules of counts requiring various levels of discipline. As to tardiness, Finely said that the two-count penalty was in effect until June 1, 1980, but that it was dropped until September 23, at which date a "tardy" or less than 2-hour absence incurred only one count. This is confirmed in the written copy of the new rules (G.C. Exh. 3). According to Finley, therefore, tardiness incurred two counts up to June 1, 1980, none until September 23, and one count thereafter. Otherwise, the new policy became effective on July 1. The same description of the new plan is given in the Respondent's statement of position in Grier's case (G.C. Exh. 13).[30]

The Respondent asserted that the normal period for determining point totals was an employee's prior 12 months. Therefore, the 12-month prior period for the new policy effective on July 1, 1980, would normally have begun in July 1979. The Respondent stated that this review period would have resulted in discharge of a significant number of employees. Accordingly, it ignored the months of July through November 1979, and began a new review period on December 1, 1979 (G.C. Exh. 14).

The Respondent's letter answering the charge states that Grier accumulated 4 absent hours due to illness on February 10, 1981, that this brought his count total to 71, and that discharge was automatic under the new rules. The Respondent argues that he would have been discharged at an earlier date under the old rules. This argument is based on analysis of Grier's attendance record, which was identified by Finley as the General Counsel's Exhibit 12, a chronologically maintained business record for 1980. The Respondent purports to reconstruct what Grier's count total *would have been* under the old rules, and concludes that he would have reached 80 counts by September 1980, assessing tardiness as 2 counts, and 85 by February 1981 assessing tardinesses as 1 count each under the new policy—totals requiring discharge in either event.[31] The higher totals produced by the Respondent's analysis result in substantial part from the fact that Grier was not charged for tardiness until October 1980, in the computation which resulted in his second discharge. The Respondent argues that Grier would have accumulated a discharge total at a much earlier time if tardiness had been "factored into his total absent hours."[32]

This argument and Grier's attendance record conflict with Finley's description of the penalty for tardiness under the old rules. As noted, the personnel manager said that the old rules assessed two counts for tardiness up to June 1, 1980, testimony which is corroborated by the printed versions of the old and new rules (G.C. Exhs. 3 and 20). Yet the Respondent did not do this in the case of Grier. His 1980 attendance record shows 12 instances of tardiness, or code 6 offenses, from January through May, 6 instances from June 1 through September 23, and 5 for the balance of the year. Tardiness offenses are circled on the General Counsel's Exhibit 12 only for the last 3 months, and are not circled for the first 9 months. The Respondent explains that the circled dates are those for which Grier was "charged with absent hours" (G.C. Exh. 13). There are ambiguous numbers in the righthand column of the General Counsel's Exhibit 12, but they are not explained by Finley or the Respondent could not have penalized Grier for tardiness during the first 5 months of 1980, because it alleged that he did not reach a discharge total of counts until February 10, 1981. Indeed, that is what the Respondent contends in its brief.

The absence of charging for tardiness from June 1 through September 23 is consistent with the confidential policy memorandum and Finley's testimony explaining the hiatus in charging tardiness during that period. However, there is no explanation for the fact that Grier's tardiness from January through May was not charged, since alleged company policy was to assess two counts for tardiness during *that* period. If the General Counsel's Exhibit 12 was maintained on a chronological basis, then the foremen or supervisors who recorded Grier's tardiness from January through May should have charged him for it. If this had been done Grier would have reached the discharge total of 68, *under the new rules*, at an even earlier date than the Respondent alleged that he did. The same inconsistency is found in the attendance record of Alex Smith.[33] These contradictions raise doubts about the accuracy of Grier's attendance record.

[30] A different description of the Respondent's new rules is given in its statement of position in connection with the charge in Case 10-CA-16288, which alleged the discriminatory discharge of Alex Smith (G.C. Exh. 1(f)). The Respondent's statement omits any reference to a sixth type of absence. The fifth type is described simply as "Partial Day," and the sixth type described in the June 1 memorandum is eliminated (G.C. Exh. 14).

[31] R. Br., pp. 122-124(b).

[32] Ibid.

[33] G.C. Exh. 13. Although the General Counsel did not issue a complaint on the charge that Smith's discharge was unlawful, and that issue is therefore not before me, Smith's attendance record is relevant on the issue of the accuracy of the Respondent's records.

Finally, there is no evidence of *actual discharge* of employees under the old rules, as a means of assessing the Respondent's argument that Grier would have been discharged at an earlier date under those rules. In its statements of position in the cases of Grier and Alex Smith, the Respondent lists various employees who allegedly had been discharged pursuant to the *new rules* (G.C. Exhs. 13 and 14). However, there is no assertion about discharges under the *old rules*. The latter were placed in evidence by stipulation, without testimony (G.C. Exh. 20). Finley testified about *work rules* on attendance which, unlike the confidential guidelines, *were* distributed to employees (G.C. Exh. 5). However, these rules merely spell out what the Company asserted its policies to be (without disclosing to employees its confidential guidelines), and Finley merely testified that the work rules were in effect.

In summary, the Respondent's argument depends on proof of prior discharges of other employees under the old rules as a predicate for its contention that Grier would have been discharged at an earlier date under those rules. Yet company documents show that it did not apply the old rules in a manner consistent with its asserted policy at that time, and there is no evidence of actual discharge of employees under the old rules. Further, the Respondent has submitted different explanations of its alleged new rules (G.C. Exhs. 13 and 14). For these reasons, I do not accept the Respondent's hypothetical argument on this issue. Its statement of position (G.C. Exh. 13) asserts that Grier's second discharge was "automatic under" its new rules, a statement which clearly implies a causal relationship between the rules and the discharge. Contrary to the Company's argument, therefore, I find that Grier's second discharge was caused by his asserted violation of the Respondent's new rules on attendance and absenteeism.

I. *Bailey's Meeting with Employees in April 1981—Keith McGaughey*

1. Summary of the evidence

a. *Bailey's meeting with employees*

The complaint in Case 10-CA-17089 alleges that Bailey, about April 28, 1981, threatened employees with discharge because of their union activities. Keith McGaughey, a current employee at the Tucker plant, signed a union card in 1980, wore a union sticker in 1981, and attended two union meetings. He described several company meetings in 1980 in which Bailey said that the Union was "no good" and that the employees were not "putting out enough work." The Tucker employees were "nonunion," according to Bailey.

McGaughey testified that he attended a meeting of employees about April 28, 1981, at which Bailey and Askham were present. According to McGaughey, he asked Bailey, since she was the employees' "representative," why he could not talk to her and why he never received answers to questions. McGaughey asked why Bailey always said the Union was not winning, and was not doing the Atlanta employees any good. He said that Bailey treated employees unfairly, and gave as an example the fact that employees did not have uniforms to wear at work, while Bailey did give uniforms to her nephews. Bailey replied that employees could get uniforms, but that they had to see the "uniform man." When McGaughey responded that Bailey had never told them this, Bailey "got mad." She said that she was not going to have anybody tell her how to run her business, that she was tired of hearing talk about the Union, and that the Union was not "in." The company president stated that the Tucker employees had nothing to do with the Elizabeth Street employees, that she did not even go to the Elizabeth Street plant anymore, and that Tucker was "nonunion." Bailey further declared, according to McGaughey's testimony, that she would fire anybody who engaged in a strike. "They'd have three days and a letter would be mailed." Some of the Tucker employees did engage in a strike the following month, according to McGaughey and Askham.

In McGaughey's pretrial affidavit,[34] he asserts that he attended a meeting of about 50 employees on April 28, 1981. Bailey spoke about matters in general, and then asked whether there were "any gripes." McGaughey said that Bailey was treating employees unfairly, that she had asked to be their representative, but that they could not talk to her. McGaughey wanted to know why the employees could not get uniforms, and why Bailey's nephews had uniforms. McGaughey further asked Bailey why she fought the Union so hard if it were true that it could not help employees. At that point, according to the statement, Bailey gave McGaughey a "mean look" and told him that she did not want anybody telling her how to run her business (G.C. Exh. 17).

Bailey testified that she had a "general meeting" with about 50 employees in April 1981. Asked whether the subject of the Union came up, Bailey replied, "Not that I recall." McGaughey asked for work uniforms because of the nature of his job in the "teardown" department, and Bailey responded that she put "fringe benefits" into pay rather than into uniforms. McGaughey kept "mumbling and grumbling and interrupting" the meeting with questions about uniforms, for at least 5 minutes. McGaughey was prolonging the meeting, but Bailey was not irritated or disturbed. McGaughey did, however, irritate other employees, and Bailey asked McGaughey several times to be quiet.

Vice President Askham testified that McGaughey asked why the Company did not supply uniforms for employees in the "teardown" department. Bailey replied that the Company had a previous experience with a uniform rental company that was unsatisfactory. McGaughey asked again why the Company did not supply uniforms and Bailey replied that it put money for employees into wages. McGaughey asked the same question two or three times and employees were becoming restless, so the meeting was adjourned.

[34] The affidavit was introduced by the General Counsel after the Respondent utilized it on cross-examination in an attempt to impeach McGaughey.

b. *McGaughey's meeting with Bailey and Askham*

McGaughey was called into an office by Bailey immediately after the employee meeting on April 28. According to McGaughey, Bailey "fussed him out," and said that he "intimidated her in front of the employees." She told McGaughey that the employees were really laughing at him, and that he should not continue to ask such questions or the employees would continue to laugh. If he was not happy with his job, he should be a cowboy[35] or a truckdriver, and leave her business alone.

McGaughey replied that he had never been "a quitter." He said this to Bailey, according to his testimony, because he "had seen so many people done wrong that somebody's got to stand up to her." The conversation ended, according to McGaughey, when Bailey "screamed" at him and made him leave the room. McGaughey's pretrial statement is in similar vein. He told the company president she did not really care about the workers, and she told him to quit speaking up for people, to quit, and find another job (G.C. Exh. 17).[36]

According to Bailey, she told McGaughey that people were laughing at him and "*intimidating*" *him*. "I don't like that," Bailey told McGaughey, and wanted to know what his "problem" was. McGaughey said that he did not like his job in the teardown department and would like to be in the rodeo. Bailey then asked him why he did not join a rodeo. McGaughey replied that there was no money in it. He was later transferred out of the teardown department. Askham's testimony corroborates Bailey.

c. *McGaughey's automobile ride with Bailey and conversation with Askham*

The last complaint alleges unlawful interrogation by Bailey on May 11 and by Askham the following day. McGaughey testified that he was fearful of losing his job. A few weeks after the April 28 employee meeting, as he was walking out of the company parking lot, Bailey drove by, stopped, and told him to get into her car. He did so, and Bailey drove him to his home, about a mile away. They had a conversation about a robbery which had taken place in Tucker the year before, and about the fact that police had come to McGaughey's house, and detectives to his place of employment, to question him. Bailey asked McGaughey to sign a statement that Willie Gresham had made him sign a union card—"and really he [Gresham] ain't," McGaughey testified. Bailey told him that he would be taken to the office the next day. She told him that he was from a "good family."

McGaughey's pretrial statement avers that Bailey asked him whether he would sign a statement that Gresham had "harassed" McGaughey into signing a union card (G.C. Exh. 17). On cross-examination, McGaughey denied that *he* said this to *Bailey*. "I did not tell her. She kept asking me." He testified that Bailey kept one hand in her purse during this conversation, and surmised that she had a gun or a tape recorder, although he did not see either one. McGaughey said that he was so frightened he thought about seeing a pyschiatrist.

On cross-examination, McGaughey was asked whether he mentioned to Bailey that some detectives had come to his house. He answered affirmatively. He was then asked this question—whether he told Bailey that there "had been some people with shotguns in [his] yard," and whether the police had come with a detective. He answered, "Yes," and explained that there had been a robbery in Tucker, and that the police had questioned him at work. It was a year before, in 1980, McGaughey testified. "But now these events that occurred at your house were not last year, were they?" the Respondent's counsel asked. "Oh, yes," replied McGaughey.

Counsel posed this question: "And you told Ms. Tucker [sic] about the police being there and the shotgun?"

"It's on the police report about the robbery," McGaughey answered.

Counsel persisted: "Yes, I understand that, Mr. McGaughey, but the point I want to—the question I want to ask is did you tell Ms. Bailey about all this during that conversation in her car?"

"Oh, yes," replied McGaughey. "We just had a general conversation on the way home, you know."

"And that was when she . . . asked if you would sign a statement right?"

"Yes." replied McGaughey. "She tried to scare me. She knew about the detectives coming out to the plant. They took me into personnel."

The day after his ride with Bailey, McGaughey was taken to the office, where he had a conversation with Askham and Bill Hames.[37] According to McGaughey, they "tried to put words in [his] mouth." Hames told McGaughey not to be "scared," and Askham "kept saying ain't it true Willie James [Gresham] made you sign a card . . . ." According to McGaughey, he was "scared for [his] job and . . . said yes."

On cross-examination, McGaughey was asked whether the subject of the police investigation of the robbery came up. He agreed that it did, but said that Askham and Hames "acted like they didn't believe that I got took to [the Respondent's] office."

Asked whether he "indicated" to Askham that the detective came to his house and "people with shotguns" into his yard, the witness replied, "Oh, they come to work," obviously referring to the detectives at the Respondent's plant. Added McGaughey, "They [Askham and Hames] acted like he [sic] didn't know about it."

Counsel continued with further leading questions asking whether McGaughey told Bailey and Askham about the "people with shotguns" in his yard. Answered

[35] McGaughey admires cowboys, rides horses, attends rodeos, and had a cowboy hat at the hearing. He is known as "Cowboy" in the plant.

[36] McGaughey's statement avers that Bailey also kept another employee after this meeting, and that she and Askham remained "in the room" with McGaughey and this other employee. On cross-examination, McGaughey said that this other employee was not present when McGaughey had his conversation with the company officials. In explanation, McGaughey said that he was present when Bailey talked to the other employee, but that Bailey and Askham then took him to Bailey's office.

[37] Hames was found to be a supervisor in the first proceeding, 238 NLRB 209, 211 fn. 9.

McGaughey, "They acted like they didn't believe me. The detectives come to work."

At this point, the transcript reads:

> Q. Yes or no, Mr. McGaughey.
>
> A. What's that?
>
> Q. Did you say the same thing to Mr. Askham the following morning?
>
> A. Oh, yes. He asked me. He said he didn't know nothing about a detective coming to work and questioning me. That they were going to look into it for me.

Bailey agrees that she drove McGaughey home one afternoon after the April 28 meeting, but gives a completely different version of the event. She sometimes gives employees a ride to the bus stop and, thinking that McGaughey was going there, offered him a ride. McGaughey accepted, saying that he had been wanting to talk to Bailey, and the latter then drove him to his home.

McGaughey started the conversation, according to Bailey, by saying that he had been "spouting his mouth off," that he really could not learn to keep it shut, and that Willie Gresham had threatened him. On Bailey's inquiry, McGaughey further explained that Gresham said there was going to be a strike, and that "anybody that crossed the picket line, they were going to be hurt." Gresham had a "new car the Lord have given him," full of "guns and knives." McGaughey told Bailey, according to the latter: "Some of the union people have been to my house with shotguns." The police were there when the "union people" were there, and a detective gave him a card, according to Bailey's version of what McGaughey said. McGaughey was afraid that Gresham was going to burn his house down, and McGaughey's father told him "not to mess with Willie James." Bailey asked McGaughey whether he would sign a statement, and the latter said that he would. After leaving McGaughey at his home, Bailey went back to the plant and instructed Askham to check into the matter.

Askham corroborated Bailey's testimony that she asked him to investigate, and called McGaughey into his office the next morning. He asked McGaughey whether the latter felt afraid, and was told that Willie Gresham had said that there would be guns and knives if anyone crossed a picket line. McGaughey also said, according to Askham, "People with guns and knives in his yard were union related." McGaughey took a card from a detective out his pocket and gave it to Askham. The latter testified that he replied to McGaughey with expressions of doubt that company employees would use guns and knives, but promised to investigate the matter. Askham further asserted that he called the detective, learned that the matter under investigation was a burglary unrelated to the Union or the plant, and therefore dropped the matter. The detective's card is in evidence (R. Exh. 4).

2. Factual analysis

a. *The April 28 meeting*

Although Bailey and Askham give versions of this meeting which are different from McGaughey's, they do not deny his testimony that some of his questions incorporated statements about the Union—such as the question why Bailey always said the Union was not winning and was not doing the Atlanta employees any good. Asked whether the Union came up at the meeting, Bailey merely answered, "Not that I recall." This is not a specific denial. The subject matter of the meeting clearly involved wages and working conditions, such as work uniforms—subjects of traditional concern to unions. McGaughey was a union adherent and the Respondent was continuing to resist union representation of Tucker employees. It is, therefore, highly probable that McGaughey incorporated the Union into his questions, and I credit his unrebutted testimony that he did so.

McGaughey's testimony about Bailey's responses is similarly unrebutted in Bailey's and Aksham's general testimony. Given Bailey's resistance to the union movement established in this and prior proceedings, and McGaughey's union-oriented questions at the meeting, it is probable that the Company would have responded as McGaughey testified that she did. Accordingly, I credit McGaughey that Bailey told a group of about 50 employees on April 28 that she was not going to let anybody run her business, that she was tired of hearing talk about the Union, that the Union was not "in" (at Tucker), and that Tucker employees had nothing to do with Elizabeth Street employees. She further told the employees that she would fire anybody who engaged in a strike.

b. *McGaughey's interview with Bailey after the employee meeting*

I have carefully considered McGaughey's appearance on the stand, his cowboy hat, and his manner of speaking. It is true that his deep admiration of cowboys and rodeos may tend to cause employee humor in the plant. On the other hand, the questions he directed at Bailey involved matters of great importance to employees which had caused protracted struggle with management. Although some employees may have laughed at him—a matter which I do not decide—there is little likelihood that they "intimidated" McGaughey, who was speaking in their interest. Bailey's statement that they did so is, therefore, incongruous. I conclude that Bailey's testimony involves a distortion of her actual statement to McGaughey—that *he* had intimidated *her* —and I credit McGaughey's description of this conversation.

c. *McGaughey's automobile ride with Bailey and conversation with Askham*

The company witnesses continue to present distorted versions of reality. On the basis of McGaughey's testimony corroborated by Askham's version of the police report and by the detective's card in evidence, I conclude that McGaughey was questioned by police in connection with a burglary, and that some of this question-

ing took place in the Respondent's offices. There is no reason to doubt McGaughey's testimony that these events took place in 1980, and I so find. They are, therefore, removed in time from McGaughey's automobile ride with Bailey and subsequent conversation with Askham, which happened in May 1981.

Nowhere does McGaughey testify that the actual events of 1980 involved "union people with shotguns in his yard." And, although the Respondent's counsel strenuously tried to get McGaughey to testify that *he told this* to Bailey, the record does not disclose any such admission. Moreover, it is incredible that McGaughey, a union protagonist, would have protested to Bailey about alleged union threats to his own well-being which had occurred in a prior year. It is also incredible, for the same reason, that Gresham would have threatened McGaughey about crossing a picket line. At the April 28 meeting, only a few weeks before the car ride in May, McGaughey spoke up for the employees to such an extent that he was chastised by the company president.

I credit McGaughey's specific denial that he told Bailey that Gresham had "harassed" him into signing a union card, his denial that Gresham actually did this, and his affirmation that Bailey "kept asking" him whether Gresham did so. What actually happened was a general discussion between Bailey and McGaughey about the burglary investigation, about which Bailey must have had prior knowledge. It is unbelievable that the company president did not know that the police had come to her own plant to investigate one of her own employees in connection with a burglary. Bailey may have surmised that McGaughey felt insecure about this investigation—the outcome of which is not evident from the record—and may have tried to "scare" him, as he testified. I credit McGaughey's version of the conversation in the automobile ride, and find that Bailey asked him whether Gresham had "harassed" him to sign a union card and whether he would sign a statement to this effect.

I also credit McGaughey's testimony that Hames told him the next day not to be "scared," and that Askham continuously asked him whether it was true that Willie Gresham had made him sign a union card. I credit the testimony of both witnesses that there was discussion of certain events that had taken place at McGaughey's home. However, I reject Askham's testimony that it involved "union related people with guns and knives." Instead, crediting McGaughey, I conclude that the discussion involved a police investigation of McGaughey concerning a burglary, and consider it incredible that Askham and Hames did not know that the police investigated McGaughey at the plant. Askham's testimony that he dropped the investigation after learning that the alleged events involved a burglary, unrelated to the plant, is preposterous. The events concerning the burglary took place months before in 1980, and Askham knew this.

Askham testified that the detective said that the matter involved a burglary. He did not testify that the detective said that McGaughey *complained to the police about union harassment*. There is nothing in this hearsay to warrant an inference that McGaughey made the same complaint to the police which, Askham asserts, he made to the Company. Finally, McGaughey would have had no reason to give an erroneous report about union harassment to Askham, since he was a union adherent. Askham's testimony is therefore false. When McGaughey, after repeated inquiries, told Askham and Hames that Gresham made him sign a union card, he did so, as he testified, because he was "scared for [his] job," not because he was "scared" of Gresham or the Union. I credit McGaughey's denial at the hearing that Gresham did in fact engage in any such coercion. Although he may appear eccentric, I consider McGaughey to be a more truthful witness than Bailey or Askham. As a current employee he was testifying against his own interest, a factor giving weight to his testimony. *Gold Standard Enterprises*, supra. Askham "dropped the investigation," not because the police told him about a burglary, but because he could not rely on McGaughey to sign the false statement against Gresham which the Company wanted.

The company officials attempted to confuse an ingenuous employee by pretending lack of knowledge of a prior event in order to create the illusion that it was a current event. They then combined McGaughey's probable concern over the burglary with his undoubted worry about his job which resulted from his speaking up at the April 28 meeting and subtly tried to substitute his fear over these real matters for a purely fictional fear of Gresham. No wonder that McGaughey thought about seeing a psychiatrist! The Respondent's object was clear—to create false evidence of union coercion of employees by preying on the fears of a gullible employee. The Respondent's evidence resembles a scenario from the theater of the absurd more than it does the conduct of labor relations.

The foregoing considerations warrant an inference that the Company believed McGaughey to be vulnerable in connection with a criminal investigation, and sought to obtain from him a false statement that another employee had coerced him into signing a union card. In the course of this attempt, Bailey asked McGaughey whether another employee had made McGaughey sign a union card and Askham repeated the question the next day. These events took place in early May 1981.

J. *Other Evidence of Animus*

Maxey Cox, an employee at the Elizabeth Street plant,[38] testified that he had a conversation in April 1981 with Willard Kelly[39] about rumors of a pending strike. Kelly stated, according to Cox, that Company President Bailey had said that the employees would not get a raise if they went on strike. Kelly testified that he supervised 17 employees and that 16 of them went out on strike, but denied hearing any rumors of the strike before it happened. He also denied the statement attributed to him by Cox and denied attending any company meetings concerning the strike. He also said he had no knowledge that the Tucker employees had received a raise.

Employee Orlando Adwaters, a member of the union negotiating committee, testified that during the strike the

[38] In the former proceeding, the Board found that Cox had been discriminatorily laid off and suspended. 238 NLRB 209, 237.

[39] Kelly testified that he is the supervisor of the teardown department at the Elizabeth Street plant.

Company obtained food for "scabs" from a "fast-food" purveyor called "Zesto's." Adwaters also stated that on June 15, 1981, when strikers had returned to the plant, another employee, James Jones, told Kelly that he had "to crank up the Zesto's wagon." Kelly assertedly replied, "Well, that's all right. Your day is coming because every dog has his day."

Kelly admitted that he obtained lunch for nonstriking employees during the strike, but insisted that he paid for it. He admitted that Jones, after the strike, asked him to get some food at Zesto's for the returning employees, but denied replying that the striking employees would "get theirs," or that "every dog has his day." Instead, Kelly testified, he made the same offer to the returning strikers that he did to the nonstriking employees—he would go get the food if they would supply the money. The employees did not take him up on his offer, according to Kelly.

The General Counsel submitted this evidence as background evidence of animus and did not allege any separate violations of the Act.

I interpret Cox's testimony as meaning that Kelly *obtained* the food for nonstrikers rather than that he *paid* for it. Cox and Adwaters were more believable witnesses than Kelly. It is almost incredible that a supervisor in a company wracked by labor disputes over union representation, wages, and other issues resulting in a strike would have had no discussions with his superiors about these problems which undoubtedly affected morale and production. I credit Cox and Adwaters as to the statements attributed to Kelly.

K. *The Strike at the Tucker Plant*

The testimony of Ford, Askham, and McGaughey establish that there was a strike at both the Tucker and Elizabeth Street plants in May 1981. Askham estimated that "approximately ten percent" of the Tucker employees struck, while McGaughey's affidavit affirms that about one-third of these employees were on strike (G.C. Exh. 17). The Respondent's brief asserts that "many" of the Elizabeth Street employees were strikers (R. Br. p. 18). The strike lasted about a month, and most of the employees then returned to work.

L. *Legal Conclusions*

1. The alleged independent 8(a)(1) violations

a. *The alleged unlawful no solicitation/distribution rules*

Under established law, any restriction during nonworking time on solicitation of employees to engage in protected activity, and on distribution of union literature during nonworking time in nonworking areas, is presumptively violative of the Act, absent a showing that the employer's special needs for maintenance of production or discipline justify an exception. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

On the other hand, a rule prohibiting distribution in work areas is lawful on its face. *La Marche Mfg. Co.*, 238 NLRB 1470 (1978). Until recently, the Board held that a rule prohibiting solicitation during "working time" was presumptively valid, but that a prohibition against such activity during "working hours" interfered with the statutory rights of employees. The reasoning behind this distinction was the Board's former position that the term "working hours" includes the nonworking time of break periods, when employees may legitimately engage in protected activity, whereas the term "working time means only the time that employees are actually working. The presumptive invalidity of a rule prohibiting solicitation during "working hours," however, could be rebutted by evidence that the employer applied or communicated the rule in such a way as to convey an intent to permit solicitation during nonworking time. *Essex International*, supra.

More recently the Board has concluded that the terms "working hours" and "working time" are both ambiguous, and susceptible to interpretation by employees that they apply to periods in the workday when the employees are properly not engaged in work functions, such as breaktimes. An employer who does not intend that his employees misinterpret the rules in this way need only frame them in such manner that they clearly do not apply to breaktime and other nonworking time. Therefore, a prohibition against solicitation during "working time," like "working hours," is, unless clarified, presumptively invalid. *T.R.W. Bearings*, 257 NLRB 442 (1981).

I conclude that work rule 7 was lawful on its face under Board law applicable at the time that Bailey made her speech in August 1980. However, as previously noted, the original complaint in Case 10–CA–16207 alleges that the Respondent's unlawful rule was promulgated during Bailey's speech. The rules stated by the Respondent's president were significantly different from the published rule, although Bailey told her listeners that her statements came from the rule. Thus, Bailey prohibited any solicitation whatever, any solicitation on company property, and/or any solicitation in another employee's work area during working hours. All of these prohibitions were unlawful under Board law then in effect. The first two statements were impermissibly broad, while, as to the third, Bailey failed to convey an intention that solicitation during working hours would be permitted on nonworking time. I, therefore, conclude that the Respondent orally promulgated and enforced a new rule on solicitation, or modified and enforced its old rule in an unlawful manner violative of Section 8(a)(1). *Timken Co.*, 236 NLRB 757 (1978).[40]

I also conclude that the Respondent had knowledge of the other solicitation, not involving union activities, which took place on a widespread scale in the plants during both working and nonworking time. This is a necessary inference because of the supervisory involvement in this solicitation. Accordingly, the Respondent selectively applied its published rule in a discriminatory manner so as to ban only union solicitation, in violation of Section 8(a)(1). Although discriminatory application of the published rule was not alleged in the complaint, the issue is closely connected to the subject matter of the

[40] See also *Clougherty Packing Co.*, 244 NLRB 901 (1979); *Staco, Inc.*, 244 NLRB 461 (1979); *Transcon Lines*, 235 NLRB 1163 (1978).

complaint, and has been fully litigated. *Timken Co.*, supra.

The Respondent argues that the new rule stated in its employee handbook is lawful under the Board's criteria in *T.R.W. Bearings*, supra, because the rule "clearly defines the phrase 'working time' as not including meal time or break time . . . ."[41]

I do not agree. The first sentence in the handbook rule contains a broad prohibition against solicitation and distribution during "working time," without defining that phrase and without stating that solicitation *may* take place during breaktime and mealtime. The second sentence is also cast in prohibitory language and further refines the first prohibition so as to make certain that it applies even though the soliciting employee is *not* on working time, such as "lunch or on break," as long as the solicited employee *is* on such time. It is only in this negative language and elliptical manner that the phrase "not on working time" is defined, and it is limited to the soliciting employee.

It is true that a trained logician might deduce that the definition of "not on working time" means the same whether applied to solicited or soliciting employee, and might make the further inferential leap that solicitation *is* permitted when *both* employees *are* on breaks or lunch periods. Nowhere is this expressly stated in the new rule, however. Nowhere does the rule state when the employees may engage in solicitation or distribution. Rather, it tells them when they may *not* do so. The third sentence, although part of it is a statement of the rule in *La Marche Mfg. Co.*, supra, further uses the phrase "working time" without explanation.

I do not believe that a rule requiring training in medieval logic as a prerequisite to its understanding can be said to be "clarified" within the meaning of *T.R.W. Bearings*. The Respondent's handbook rule is not framed in the language of the workplace, and is not the kind of language employees may be expected to understand. This obscurity has a tendency to interfere with employees' exercise of their rights under the Act. Its coercive effect is augmented by the fact that the Respondent utilized a purported violation of its former rule as a pretext in its discriminatory discharges of three employees in the prior proceeding, and by the fact that the Respondent's president misstated and modified work rule 7 in August 1980 in an unlawful manner, coupled with threats of discharge for its violation, as I find hereinafter.

With this coercive background, the Respondent faced a heavy burden in framing its 1981 rule in a manner which would clearly convey to its employees when they *could* engage in union solicitation and distribution of union materials. The Respondent failed to do so, and I, therefore, conclude that the Respondent's 1981 handbook rule is unduly broad and violates Section 8(a)(1).

It is obvious that work rule 7 also fails to meet the criteria set forth in *T.R.W. Bearings*, supra, since it uses the ambiguous phrase "working time" without clarification.

The Respondent, however, argues that *T.R.W. Bearings* may not be applied retroactively so as to justify a finding that work rule 7 was unlawful prior to July 31, 1981 (the date of issuance of *T.R.W. Bearings*), since the rule was permissible under law applicable at that time. Such retroactive application of the Board's policy would, according to the Respondent, raise "serious constitutional and equitable problems."[42] The Respondent cites *Lilliston Implement Co.*, 171 NLRB 221 (1968), where the Board refused to find unlawful an employer's polling of its employees' union sympathies under circumstances which were lawful at the time under the Board's criteria in *Blue Flash Express*, 109 NLRB 591 (1954), but which did not include a secret ballot and were therefore unlawful under the Board's later rule at the time of litigation, as stated in *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The Board refused to apply the *Struksnes* rule retroactively in *Lilliston*, "[i]n the absence of any circumstances dictating a contrary course," including the fact that the employer had not committed any other unfair labor practices. *Lilliston Implement Co.*, supra, 171 NLRB 221 at 225.

The Respondent also relies on the decision of the Court of Appeals for the Eighth Circuit partially denying enforcement of the Board's Order in *Drug Package Co.*, 228 NLRB 108 (1977), enfd. in part 570 F.2d 1340 (8th Cir. 1978). In that case the administrative law judge recommended a bargaining order on the authority of *Steel-Fab*, 212 NLRB 363 (1974), and the Board, which had thereafter issued its decision in *Trading Port*, 219 NLRB 298 (1975), ordered retroactive bargaining on the rationale of the latter case. The court's disagreement with this remedy was predicated on its opinion that there had never been an 8(a)(5) violation in the first place, and on the fact that the employer had rejected the union's offer of reinstatement of strikers, relying on the *Steel-Fab* doctrine that, if a bargaining order did issue, it would be prospective only. The Board considered the strikers to be unfair labor practice strikers entitled to reinstatement, with the employer subject to "substantial backpay liability." "It would be fair to assume," the court stated, "that the Company, had it known of the possibility of these penalties, might have given the Union's offer greater consideration." Accordingly, the Eighth Circuit denied enforcement of this portion of the Board's Order (570 F.2d 1340 (1978)).

The Charging Party, on the other hand, relies on *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), where the Board dismissed a representation petition on a revised contract-bar policy, with the statement that to "allow the instant proceeding as an exception without permitting a similar exception to all pending cases would be inequitable. . . . The judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, we believe, the wiser course to follow" (id., 121 NLRB at 1006–1007).

The issue posed by these contrasting views has been considered in numerous cases and articles.[43] It is mani-

[41] R. Br., p. 127.

[42] R. Br. pp. 126–129.

[43] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860–861 (2d Cir. 1966); *NLRB v. A.P.W. Products*, 316 F.2d 899 (2d Cir. 1963); *NLRB v. Teamsters*, 225 F.2d 343 (8th Cir. 1955); Davis, *Administrative Law Treatise* § 17.08.

festly beyond the scope of this decision to survey the entire field. Instead, I rely on the recent summary by the Court of Appeals for the Eighth Circuit which, after setting forth the Board's authority to announce new rules of law in adjudicatory proceedings, stated as follows: "In deciding whether to exercise that power, however, the Board must weigh the benefits to be achieved by the new interpretation of the law against the detrimental effects of retroactive application of the new rule." *Drug Package Co. v. NLRB*, supra, 570 F.2d 1340, 1346, fn. 5.

Consideration of two cases will illustrate the Board's approach to this problem. In *Perma Vinyl Corp.*, 164 NLRB 968 (1967), a bona fide purchaser acquired an enterprise with knowledge of the predecessor's unfair labor practices. Under applicable law at that time,[44] the purchaser was not responsible for remedying the unfair labor practices of the predecessor. The Board reconsidered the matter, and, balancing the equities, concluded that in such circumstances a successor should be held responsible for remedying the predecessor's unlawful conduct. However, it deemed a requirement of full remedial action on the part of the successor in the case at bar to be "inequitable," since there was no such requirement under applicable law at the time of the transaction. Nonetheless, since the successor was still doing the same work, the Board held that a requirement of reinstatement of the discriminatees "would plainly serve a salutary purpose, without subjecting [the successor] to any unfair burden," and so ordered (id., 164 NLRB at 970).

Finally, prior to *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), the Board had issued decisions stating or implying that the right of economic strikers to reinstatement was determined at the time of application therefor, and, if a replacement held the position at that time, the striker was thereafter entitled only to nondiscriminatory treatment. The Board's reconsidered view, as set forth in its decision, was that such strikers were entitled to reinstatement to fill positions left by departing permanent replacements, absent a legitimate and substantial business justification for failing to do so. In imposing this burden on the employer, despite the fact that it represented a change in prior law, the Board stated that former practice was "inherently destructive of employee rights," and noted that the employer in fact was discriminatorily motivated (id., 171 NLRB at 1369).

On appeal, the Court of Appeals for the Seventh Circuit considered the employer's argument that imposition of backpay liability was improper because revised Board policy was being applied to conduct which was lawful at the time it was performed. The court, however, accepted the Board's argument that, unless the disadvantaged strikers were compensated, they would have been penalized for exercising statutorily protected rights, and the effect of discouraging such exercises would not be completely dissipated. Accordingly, the Board's order was enforced. *Laidlaw Corp. v. NLRB*, supra.

In application of these principles in the instant case, we first note that the amended complaint in Case 10-CA-16207 in effect alleges the illegality of work rule 7 since March 6, 1980.[45] Although I have heretofore found that the Respondent promulgated an unlawful rule and/or modified work rule 7 in an unlawful manner, in Bailey's speech on August 22, 1980, and that the Respondent's 1981 handbook was unlawful under the *T.R.W. Bearings* doctrine, these findings do not resolve the alleged illegality of work rule 7 since March 6, 1980. Retroactive application of *T.R.W. Bearings* would clearly result in such a finding. In the language of the Court of Appeals for the Eighth Circuit in *Drug Package*, would the benefits achieved by such retroactive application outweigh the detrimental effects?

The Board has already adopted the former administrative law judge's characterization of this Respondent as an employer with "profound antiunion animus." *Our Way, Inc.*, supra, 238 NLRB at 227. The facts in this proceeding can only serve to emphasize that judgment, and to underline the Respondent's adamant opposition to the basic policies of the Act. One of the Respondent's principal tools in its efforts to thwart the statutory rights of its employees is the use of work rules. Thus, it maintained an unlawful no-solicitation rule in 1978, and used it as a pretext in the unlawful discharge of three employees as delineated in the last decision. It then changed the written version of the rule so as to conform to *Essex International*, but then, on the emergence of union activity at the Tucker plant, promptly issued an oral modification of that rule which was unlawful—and, as I find hereinafter, again utilized such rule as a pretext in the unlawful discharge of still another employee (Skidmore). Finally, on issuance of the Board's *T.R.W. Bearings* decision, the Respondent again purported to comply with Board law, but again evaded it.

On this record, it is fair to say that the Respondent has demonstrated a proclivity to utilize work rules to violate the Act. The Respondent bears no resemblance to the law-abiding employer in *Lilliston*, cited by the Company. Protection of the rights of its employees would be aided by determination of all aspects of its unlawful conduct, and, accordingly, would be beneficial.

On the other hand, the Respondent will suffer no financial detriment whatsoever. Unlike the employers in *Perma Vinyl*, *Laidlaw*, and *Drug Package*, retroactive application of the Board's new rule in *T.R.W. Bearings* will not require the Respondent to reinstate any employee or to pay any backpay. It will merely require that a public record more fully disclose the Respondent's unlawful conduct. Since the Board with judicial approval imposed financial requirements on the employer in *Laidlaw* by retroactive application of a new rule, a fortiori it should do so in the instant case where no financial burden is being imposed. Accordingly, by retroactive application of *T.R.W. Bearings*, I find that, as alleged, the Respondent maintained an unlawful no-solicitation rule since March 6, 1980.

[44] *Syms Grocer Co.*, 109 NLRB 346 (1954).

[45] The 10(b) period for the charge in that case.

b. *Additional allegations of unlawful interference, restraint, or coercion*

I further conclude that the Respondent violated Section 8(a)(1) of the Act under established Board law by the following acts and conduct:

1. On or about August 22, 1980, by Bobbie Bailey telling employees that anyone violating an oral rule against solicitation (which was unlawful) would be fired, that she would shut down the plant before she would let the Union come in, that the Union could not compel her to give anything to employees, and that there would be no union at Tucker. The latter two statements were unlawful because they conveyed to employees an impression of the futility of their union activities.[46]

2. On or about August 29, 1980, by Charles Askham asking an employee whether she had been handing out union cards and whether she had been doing so during lunch periods.

3. On or about April 28, 1981, by Bobbie Bailey telling employees that she would fire anybody who engaged in a strike.

4. On or about May 11, 1981, by Bobby Bailey, and on May 12, by Charles Askham, asking an employee whether another employee made him sign a union card, and soliciting an employee to make a false accusation of coercion by another employee in connection with the signing of union cards.[47] *Glazers Wholesale Drug Co.*, 209 NLRB 1152, 1156 (1974).

2. The alleged violation of Section 8(a)(3)—Betty J. Skidmore

As recounted above, Skidmore steadily improved during about 3 years of employment to the point where she was rated a "very good" employee in early 1980. In August 1980 she became one of the leaders of the union campaign at Tucker, spoke to fellow employees, and obtained about 25 signed cards. She was discharged on August 29, 1980, assertedly because of violation of work rule 7—"Soliciting."

In the former proceeding, the Board adopted the finding of the administrative law judge that the Respondent discriminatorily discharged three employees, despite the Company's contention that they had "harassed" other employees to take union cards and patches and had "interfered" with production. When one of the three (Grier) asked Bailey to explain what she meant by "interfering" with other employees, Bailey refused to give an explanation. *Our Way, Inc.*, 238 NLRB 209 at 226 (1978).

Although the Respondent now asserts that soliciting in violation of work rule 7 was the reason for Skidmore's discharge, Company Vice President Askham said that the personnel department informed him that Skidmore had "harassed or intimidated" another employee—language similar to Bailey's in the former proceeding. Further, Askham admitted that the only discharges or discipline of employees under work rule 7 were for *union* solicitation, despite massive evidence of other types of solicitation during working time. Indeed, the only time that the Respondent called an employee meeting about solicitation was after it learned about the union campaign at Tucker. Nor did Askham know why a first offense for soliciting was so heinous an offense that it required discharge, unlike other elements in the Respondent's progressive discipline system. The Respondent's reliance on Bowman's testimony and her affidavit[48] give it no assistance for reasons set forth above.

The disparate and selective nature of the Respondent's application of work rule 7 clearly shows that it was directed at union solicitation and no other. Under established law this constitutes evidence of discriminatory motivation. This evidence is augmented by the disparate severity of the penalty of discharge and by its unduly harsh nature, for a first offense of solicitation. The Respondent's "profound" union animus, already established in the former case, may be relied on as evidence in this proceeding.[49] It is augmented by further evidence of animus herein.

For these reasons I find that the Respondent discriminatorily discharged Betty J. Skidmore on August 29, 1980, because of her union activities, in violation of Section 8(a)(3) and (1) of the Act.

3. The alleged violations of Section 8(a)(5)

a. *The Respondent's refusal to bargain*

The pleadings in Case 10-CA-16809 establish that beginning on September 25, 1980, and continuing thereafter, the Union requested bargaining in the unit as clarified by the Regional Director's decision, including the Tucker plant, and that the Respondent refused to do so.

The Respondent asserts its willingness "to bargain in regard to the Elizabeth Street employees pursuant to the original certification." However, it contends that it is under no obligation to bargain concerning the Tucker employees because the Regional Director's unit clarification decision "was based upon clearly erroneous findings of fact and even more erroneous conclusions of law."[50]

The Company argues "special circumstances" which require review of the Regional Director's decision. Thus, it contends that "the Union admittedly conducted an unsuccessful organizing drive in the late summer and early fall of 1980" among the Tucker employees, and later called for a strike (in May 1981) which was joined by "only about 10 percent" of the Tucker employees, al-

[46] Bailey's statements that the Union could not compel her to give anything to employees, and that there would be no union at Tucker, are not alleged in any of the complaints. However, they are closely related to the issues in the proceeding and were fully litigated. Accordingly, findings on these statements are warranted under established law.

[47] The latter finding is not specifically alleged. See fn. 46, ibid.

[48] The similarity between Bowman's statement about Skidmore and the statement which the Respondent tried to get from McGaughey about Gresham is obvious. However, no finding is made concerning the circumstances surrounding Bowman's execution of her affidavit.

[49] *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980), enfg. as modified 245 NLRB 198 (1979); *NLRB v. Clinton Packing Co.*, 468 F.2d 953 (8th Cir. 1972), enfg. as modified 191 NLRB 879 (1971). The Respondent argues that its former unfair labor practices should not be relied on because they occurred in 1976 and 1977 and "are positively gray with age" (R. Br., p. 8). However, in the *J. P. Stevens* case, the Board went back 14 years to make a similar inference. *J. P. Stevens & Co.*, supra, 245 NLRB 198 at 215.

[50] R. Br., p. 11.

though "many" of the Elizabeth Street employees were strikers.[51]

The Respondent characterizes these events as "continuing expressions of disinterest" in the Union by the Tucker employees, and claims that the Board's approval of the Regional Director's decision denied Tucker employees the right of choice guaranteed them under the Act.[52]

The Respondent then engages in extended argument seeking to establish that (1) the Regional Director made erroneous factual findings, (2) the Company's Tucker plant is not substantially the same as its preexisting operation at the Elizabeth Street facility, (3) a substantial percentage of the Tucker employees are not transferees from Elizabeth Street, and (4) the Tucker plant is not an accretion to the Elizabeth Street unit.[53]

None of these arguments has merit. The Respondent's argument against the Regional Director's decision in the unit clarification proceeding were or could have been raised in that proceeding. The Respondent requested review of that decision and its request was denied by the Board. Accordingly, pursuant to Section 102.67(f) of the Board's Rules and Regulations, those issues may not be relitigated in this proceeding. *Heidelberg Eastern, Inc.*, 235 NLRB 1523 (1978). The Respondent's argument that the Union's campaign at Tucker was "admittedly unsuccessful" is vague and without evidentiary support. Its only other argument alleges a stated percentage of Tucker employees who joined the strike in May 1981—as to which the evidence is conflicting. Whatever the percentage, it did not serve as an objective consideration to support a good-faith doubt that the Tucker employees did not wish the Union as their representative, since "an employee's decision not to support a strike does not establish that he or she has rejected the Union as his or her collective bargaining representative." *Pennco, Inc.*, 242 NLRB 467, 469 (1979).[54]

Even if the Respondent had established failure of Tucker employees to support the Union, such evidence would not assist the Respondent's position because any such failure could only have taken place in the context of the Respondent's unfair labor practices at the Tucker plant and, therefore, could not be relied on as objective evidence of loss of majority status established by the certification and its amendment. *Pioneer Inn*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978). Further, even without the presumption of majority status at the Tucker and Elizabeth Street plants established by the clarified certification, the Respondent's present and former unfair labor practices have been so "outrageous" and "pervasive" that their coercive effect cannot be eliminated by traditional remedies. For example, as more fully discussed hereinafter (subsec. (b)), the Respondent has disobeyed the Board's former order that it supply employment and wage data to the Union. Together with the Respondent's former and current unfair labor practices, this recalcitrance warrants a bargaining order even in the absence of majority status. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

It is settled law that, after expiration of a certification year, a certified union enjoys a rebuttable presumption of continuing majority status. "An employer may rebut this presumption by affirmatively establishing that the union has, in fact, lost its majority status, or that it had sufficient objective bases for reasonably doubting the Union's continuing majority status . . . ." (*Pennco, Inc.*, id.) The Respondent has not met either of these criteria. Accordingly, since it admits that it refused to bargain with the Union in the unit as clarified, it thereby violated Section 8(a)(5) and (1) of the Act.

b. *The Respondent's unilateral change in the policy on absenteeism and tardiness*

As described above, the Respondent implemented a stricter policy on tardiness and absenteeism, including absenteeism because of illness, without notifying the Union. It has long been established that a sick leave plan is a term or condition of employment, and that an employer with an obligation to bargain over such plan violates Section 8(a)(5) by unilaterally changing such a plan without bargaining with the employees' representative. *NLRB v. Katz*, 369 U.S. 736 (1962). More recently, the Board with judicial approval has concluded that an employer violated Section 8(a)(5) by unilaterally instituting and enforcing a written discipline system without first bargaining with the union. *Electri-Flex Co.*, 228 NLRB 847 (1977), enfd. as modified 570 F.2d 1327 (7th Cir. 1978). This is what the Respondent did in this case, and the same principles apply.

As set forth in the factual discussion above, the Respondent argues that (1) the Union acquiesced in the stricter guidelines and (2) the Company did not conceal, but rather disclosed its new policy to the Union by means of letters to an agent of the Board. These arguments are invalid for reasons already given. The Company actually supplied the Board with two different versions of the new rules. The Respondent additionally argues that an employer is free, absent discrimination, to choose more efficient ways to enforce its workplace rules, citing *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), and notes that there is no complaint allegation that its altered rules were discriminatory. The Company points to the fact that its published rule imposing discipline for absenteeism (G.C. Exh. 4, rule 3) was not changed—only the secret rule which decided at what levels more stringent discipline would be imposed.

The Respondent's reliance on *Rust Craft* is misplaced. In that case an employer installed timeclocks because the employees' recording of their time had been slipshod. As the Board pointed out, however, the employer did not initiate "new and more stringent rules." Although it changed a "mechanical procedure" for recording the employees' time, the rule itself "remained intact" and the change was "inconsequential" for those employee who had conscientiously recorded their time in the past. It is obvious that this not the case herein—the Employer's rule specifying the level of absenteeism at which discipline would be imposed was changed to the employees'

[51] Ibid., pp. 17–19. The Respondent's statement that 10 percent of the Tucker employees joined the strike is based on Askham's testimony. McGaughey stated that about one-third of the employees engaged in the strike.

[52] Ibid.

[53] Ibid., pp. 19–44.

[54] See also *Pepsi-Cola-Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975).

detriment. The Company's contention that this secret change was not really a change in rules is sophistical. Its argument in the name of efficiency was answered by the Court of Appeals for the Seventh Circuit in the following language (*Electri-Flex Co. v. NLRB*, 570 F.2d at 1333):

> While it is true that the Act does not take from the employer the right to enforce reasonable rules for the conduct of the business and to take disciplinary action against employees who either violate the rules or are generally not suitable for efficient production . . . it is equally true that the institution of a new system of discipline is a significant change in working conditions, and thus is one of the mandatory subjects for bargaining under the provisions of Section 8(d) of the Act, included within the phrase "other terms and conditions of employment . . . ."

I therefore conclude that the Respondent, by unilaterally changing its rules governing absenteeism and tardiness, and by instituting and enforcing a new discipline system without first bargaining with the Union, thereby violated Section 8(a)(5) and (1) of the Act.

The General Counsel and the Charging Party argue that the Respondent violated the Act not only because of its unilateral change of the rule, but also because it failed or refused on request to give this information to the Union. It is clear that this is factually correct, and the Board with judicial approval has concluded that an employer's refusal to supply such information violates Section 8(a)(5) and (1). *East Coast Equipment Corp.*, 229 NLRB 825 (1977), enfd. sub nom. *NLRB v. Steco Sales, Inc.*, 98 LRRM 2438 (3d Cir. 1978).

The complaints allege only a unilateral change in the rule, not a refusal to supply information concerning it. However, the Board has previously ordered the Respondent to supply "employment and wage data" requested by the Union. *Our Way, Inc.*, supra, 247 NLRB 1441, 1445. I conclude that the Respondent, by its failure to inform the Union about its new policy on absenteeism, on the latter's request, thereby violated the Board's prior order. I also note that the issue of whether the Union failed to supply information on the new rules is closely related to the question of whether it in fact had new rules, and that the former issue was thoroughly if not vigorously litigated at the hearing. Accordingly, under established law, I conclude that the Respondent also violated Section 8(a)(5) and (1) by refusing on request to supply information relating to its employees' conditions of employment.

c. *The discharge of Larry Grier*

As described above, Grier was discharged on February 10, 1981, pursuant to the Respondent's new policy on discipline which was unlawfully instituted and enforced. The Board has concluded with judicial approval that discipline imposed under such circumstances violates Section 8(a)(5) and (1). *Boland Marine Co.*, 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977),[55] and I make the same finding with respect to the discharge of Grier.

[55] See also *Gaska Tape*, 241 NLRB 686 (1979).

d. *The wage and benefit increase to Tucker employees*

1. The complaint

The complaint in Case 10-CA-16809, as amended, alleges that the Respondent on November 14, 1980, unilaterally gave an increase in wages and fringe benefits to its Tucker employees and thereafter, on December 4, 1980, refused to honor the Union's request to bargain concerning this matter, thus violating Section 8(a)(5) and (1). The complaint was predicated on a charge filed on March 24, 1981 (G.C. Exh. 1(v)).

2. Factual summary

As described above, the Respondent gave annual raises to employees performing the same job at all of its plants based on a market survey. It continued these plans in early 1980, but stopped planning for an increase to Elizabeth Street employees after the bargaining began in April 1980. In August, after commencement of the union campaign at Tucker, the Company posted a notice stating that Tucker employees would get a raise in November. A raise in wages and an increase in fringe benefits were given to the Tucker employees on November 14. At the December 4 bargaining session, the Union demanded the same increases retroactively for the Elizabeth Street employees, and agreed to waive the filing of an unfair labor practice charge if the Respondent did so. The Company refused, saying that such matters had to be negotiated.

3. The General Counsel's position

The General Counsel relies initially on an opinion of the Court of Appeals for the District of Columbia Circuit which had previously adjudged an employer to be in contempt, and where the employer thereafter filed a motion to dissolve the court's order. *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981).[56] In the bargaining which followed the initial contempt proceeding, the employer withheld wage increases which had customarily been given on a merit basis in December. The Special Master, interpreting *NLRB v. Katz*, supra, stated that "an employer could not unilaterally continue pre-existing discretionary wage increases during the course of negotiations." The court commented as follows:

> In *Katz* the Supreme Court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company decides to alter a preexisting practice, it must give the union an opportunity to bargain over the change. The Court applied this principle to distinguish between automatic wage increases to which the employer has already committed itself and wage increases that are "in no sense automatic, but [are] informed by a large measure of discretion." 369 U.S. at 746, 82 S. Ct. at 1113. The employer would be required to grant the automatic

[56] The court had previously enforced the Board's bargaining order. *Blevins Popcorn Co.*, 218 NLRB 689 (1975), enfd. 547 F.2d 706 (D.C. Cir. 1977), cert. denied 434 U.S. 854 (1977).

> wage increase unless it notified the union that it wished to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. However, the employer could not unilaterally grant a nonautomatic, discretionary wage increase since "[t]here simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice. . . ." *Id.* Thus the union could "insist that the company negotiate as to the procedures and criteria for determining such increases." [659 F.2d at 1189.]

The court noted that although the timing of the increases was apparently automatic, there was a discretionary element in that the amount of the increases depended on each employee's classification. The court stated that the employer would be required to bargain over this discretionary matter, and remanded the case to the Special Master for further findings. The General Counsel, therefore, argues that the Respondent herein was obligated to bargain with the Union over the size of its annual wage and benefit increase at Tucker, and violated Section 8(a)(5) and (1) by refusing to do so.

The General Counsel additionally relies on a case where the Board held with judicial approval that the employer had engaged in an unlawful refusal to bargain, and where the employer's refusal to grant a retroactive pay increase to employees represented by the union, equivalent to an increase which had been granted to unrepresented employees, was violative of the Act. *Clearwater Finishing Co.*, 254 NLRB 1168 (1981), enfd. as modified 670 F.2d 464 (4th Cir. 1982). The Board adopted the finding that the employer's "object in denying retroactivity of pay equivalency to the employees in the bargaining unit was to create dissatisfaction with the Union on the part of those employees and thus further drive a 'wedge' between them" (id., JD at pp. 12–13).

The General Counsel relates this to the refusal of the Respondent herein to grant the same wage and benefit increase to the Elizabeth Street employees which it granted to those in the Tucker plant.

Finally, the General Counsel relies on *Eastern Maine Medical Center v. NLRB*, 658 F.2d (1st Cir. 1981), enfg. 253 NLRB 224 (1980). In that case the employer's former practice had been to grant wage increases to its employees based on annual wage surveys, which the court found was an established condition of employment. Following such a survey in 1977, the employer granted increases to all employees except those in the bargaining unit, and the Board affirmed the administrative law judge's finding that the employer had thereby discriminated against the bargaining unit employees in violation of Section 8(a)(3) and (1). The court rejected the employer's arguments that it had to freeze the wages of the bargaining unit employees in order to maintain the status quo and avoid a refusal-to-bargain charge, and that the withheld increase was a legitimate economic weapon in bargaining. Rather, the court concluded, the withheld increase indicated the employer's intent to inflict a lasting penalty on the bargaining unit employees for their decision to organize.

4. Respondent's position

The Respondent argues initially that the complaint allegation should be dismissed because it is based on an unfair labor practice committed more than 6 months before the filing of the charge, and therefore was not timely under Section 10(b) of the Act. The Respondent contends that, on August 20, 1980, the Union had knowledge of the wage increase more than 6 months before the filing of the charge on March 24, 1981, and that the statute of limitations began to run on the former date. The Respondent's argument is based on Ford's testimony that, at the August 20 bargaining session, union negotiator Heinz said that Bailey was "all shook up" over the organizing campaign and had "announced a raise for everybody out there at Tucker." In support of its position, the Company cites *Catholic Medical Center of Brooklyn & Queens*, 236 NLRB 497 (1978), and *Allied Products*, 230 NLRB 858 (1977).[57]

In *Catholic Medical Center*, as pertinent, the employer had previously suspended convention benefits for physicians and dentists. On March 4, 1976, it approved reinstitution of these benefits for all physicians and dentists except those in the bargaining units. Later, on March 29, it "announced to all concerned" the "implementation of this policy" (236 NLRB at 449, 501). This announcement was outside the 10(b) period. The Board, in agreement with the administrative law judge, concluded that the announcement was the event that started the running of the statute, and, accordingly, dismissed the allegation.

In *Allied Products*, as relevant, the company had an established practice of wage reviews and merit increases on the employee's anniversary date. One employee notified the union that she had not received her merit increase. This notice was outside the 10(b) period. Later, at a bargaining session, the union was told there would be no wage reviews, and other employees thereafter failed to receive their increases within the 6-month period preceding the filing of the charge. The date of the bargaining session was within the 6-month period of limitation. In its initial decision, the Board concluded that the suspension of the merit system was unlawful as it affected employees who had been denied raises during the 6-month period.[58] On appeal, the court of appeals rea-

[57] R. Br., pp. 94–96.

[58] Former Member Kennedy, dissenting, concluded that Sec. 10(b) applied. He argued that the majority opinion was based on the theory in *General Motors Acceptance Corp.*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973), that the section did not bar the complaint because employees were denied wage increases during the statutory period. He also noted his and former Chairman Miller's dissent from this opinion and their rejection of the concept that there was a continuing violation each time an employee's wage increase was withheld. The dissenting Members relied on the Board's decision in *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), enf. denied on other grounds 197 F.2d 640 (2d Cir. 1952), cert. denied 345 U.S. 905 (1953), that an employer's decision to freeze merit wage increases because of the pendency of a representation petition starts the running of the statute. Member Kennedy pointed out that, although the court of appeals in *General Motors Acceptance* rejected the 10(b) defense, "it did so upon the ground that in the aggregate a number of acts committed by the respondent within the limitation period indicated that the respondent 'was attempting to discredit the union by shifting full responsibility to it for the employees' loss of merit increases.'" The dissenting opinion also notes the court's comment that *General Motors Acceptance*

Continued

soned that the first information about one employee's denial of an increase was not adequate notice that the company had suspended its established practice of wage reviews, and that the charge was therefore timely filed. *NLRB v. Allied Products*, 629 F.2d (6th Cir. 1977). On remand, the Board concurred, noting the court's agreement with the rule that the 6-month limitation period does not begin to run until the injured party has become, or should have become, aware of the respondent's unlawful action. *Allied Products*, ibid, 230 NLRB 858 at 859.

The Respondent further argues substantively that the wage increases were completely discretionary both in timing and amount, and that there was therefore no past practice which it was obligated to continue with respect to the Elizabeth Street employees. The Respondent cites *Mosher Steel*, 220 NLRB 336 (1975), which, it says, presents "facts almost identical to those here."[59] In that case the employer had previously granted various types of individual increases and general increases, involving areas of discretion, and continued to do so during negotiations with the Union, over the latter's protest. The employer argued that it was merely preserving the status quo, but the administrative law judge, relying on *NLRB v. Katz*, supra, concluded that both the individual and general increases constituted unilateral changes in employment conditions violative of Section 8(a)(5) and (1). The Board concurred, noting that some of the employer's individual raises took place during a brief period of time, were "massive," and departed from past practice. The Board cited elements from the record supporting a conclusion that the employer's policy was discretionary (220 NLRB at 338), and the Respondent herein cites this passage, apparently to support its argument that its own wage policy was discretionary. The Company concludes that it could not lawfully have given an increase to its *represented* Elizabeth Street employees without committing "a classic Section 8(a)(5) violation."

The Company then argues that its determination to give the Tucker employees a raise was a lawful decision, made in advance of the Board's denial of the request for review of the Regional Director's unit clarification decision. "Because the Tucker increase was approved, although tentatively in amount, prior to [the] time the Union began organizational efforts in August 1980, the Company could not have canceled its plans for a Tucker raise without risking the finding of an unfair labor practice once the organizational campaign began," the Respondent argues, citing *Sinclair & Rusch, Inc.*, 185 NLRB 25 (1970), and *NLRB v. Hendel Mfg. Co.*, 483 F.2d 350 (2d Cir. 1973).

The Respondent thus concludes that the Tucker increase was lawful, because it was discretionary, whereas an Elizabeth Street increase was not required because no past practice has been shown. The latter would have been unlawful, because Elizabeth Street employees were represented by the Union.

The Company contends that the Union did not insist on bargaining for the Tucker unit "prior to September 25, 1981."[60] The Respondent's conduct was not like that of the employer in *Clearwater Finishing Co.*, supra, because it did not refuse to give a retroactive increase to the represented employees, but, instead, offered to bargain over the matter. Its decision to grant the increase at Tucker was made prior to the filing of the unit clarification petition, and the announcement of the increase (in August) was made before the Company had knowledge that any union claimed to represent the Tucker employees. After September 25, however, the Company did not refuse to bargain over an equivalent retroactive wage increase for the Elizabeth Street employees. No discriminatory motivation has been established in connection with the Tucker increase and no violation of Section 8(a)(3) in this connection has been alleged.

5. Legal conclusions

The Respondent's argument is based on a distortion of the facts. Thus, the Company's contention, that it had no knowledge prior to September 25, 1980, that any union claimed to represent the Tucker employees, flies in the face of the record, which shows that the Union demanded bargaining over the Tucker employees from the beginning of the bargaining sessions in early 1980, and that the Company refused.

The Respondent's posted notice of the forthcoming raise at Tucker was made in August, after the Respondent had learned of the union campaign and in the context of unfair labor practices including the promulgation of an unlawful no-solicitation rule and the discriminatory discharge of union activist Betty J. Skidmore. This timing and context suggest that the posting was intended to demonstrate to Tucker employees the superseniority of their position over the represented employees at Elizabeth Street and thus to denigrate the Union. The posting, however, is not alleged to be unlawful and I make no finding concerning it.

What *is* alleged in the complaint is that the Respondent unilaterally gave an increase to its Tucker employees on November 14 and refused to bargain concerning this on December 4. The Respondent concedes that the Union demanded bargaining over the Tucker unit on September 25. The Company's obligation to bargain over Tucker, therefore, arose on that date at the very latest. "It is well settled that where an employer establishes a new operation which constitutes an accretion to an existing bargaining unit, the employer's refusal to include the new operation in the bargaining unit upon the bargaining representative's request is a violation of Section 8(a)(5) and (1) of the Act." *Universal Security Instruments*, 250 NLRB 661, 670 (1980), enfd. as modified 649 F.2d 247 (4th Cir. 1981).

The Respondent nonetheless proceeded to implement the wage and benefit increase after its bargaining obligation began. Its argument that it was required to do so be-

was distinguishable from *Bonwit Teller*, "where the employer committed no unlawful conduct during the limitations period . . . ." Since Member Kennedy reasoned that the facts in *Allied Products* were more like those in *Bonwit Teller* than like those in *General Motors Acceptance*, he would have found that Sec. 10(b) barred consideration of the complaint allegation. *Allied Products*, 218 NLRB 1246, 1247-48 (1975).

[59] R. Br., p. 98.

[60] Id. at p. 101.

cause of the August announcement of the raise is incorrect, and its reliance on *Sinclair & Rush* and *Hendel*, supra, is misplaced, as those cases contain only inapposite dicta on the issue herein. On the contrary, the Respondent was obligated to bargain with the Union over the Tucker raise and over the amount. The Company concedes that the amount was "tentative" at the time of the August announcement. As the court stated in *Blevins Popcorn*, supra, this was a discretionary issue as to which the Respondent had a bargaining obligation. Accordingly, its granting of the raise without satisfying that obligation constituted a violation of Section 8(a)(5) and (1), and so I find.

The record is also clear that union negotiator Heinz demanded bargaining over the Tucker employees at the December 4 bargaining session, noting that the Regional Director's decision had included them. The company negotiator refused, saying that this was not the Board's decision. Accordingly, as alleged in the complaint, the Respondent again violated Section 8(a)(5) and (1) of the Act, and I so find.

The union negotiator demanded an equivalent retroactive raise for the Elizabeth Street employees, and, after hearing the Company's professed fears of an unfair labor practice charge, agreed to waive the filing of same. The company representative asked whether the granting of such benefits would result in a contract. This question was not an offer, and, if such, and if accepted, would have required the Union to accept a disadvantageous result on many other issues which separated the parties. Accordingly, the Union declined. The company representative then said that the issue of a retroactive equivalent increase for the Elizabeth Street employees had to be the result of negotiation. The Respondent argues that this was not a refusal to bargain over the issue. However, it clearly constituted a refusal to grant the request, and again tended to denigrate the Union in the eyes of the Elizabeth Street employees. The Tucker increase had already been granted and the disaffection which it produced at Elizabeth Street is graphically portrayed in the record.

The Respondent's conduct, therefore, falls within the rationale of *Clearwater Finishing Co.*, and *Eastern Maine Medical Center*, supra. Although the failure to grant an equivalent raise to the Elizabeth Street employees was not alleged as a separate violation, it is closely related to the complaint allegation and was thoroughly litigated. Accordingly, I find that by failure to grant this request the Respondent additionally violated Section 8(a)(5) and (1) of the Act.[61]

The Respondent's 10(b) defense is similarly without merit. The alleged unfair labor practice was not the announcement in August 1980 of a forthcoming raise at Tucker. Rather, it was the unilateral implementation of the raise on November 14, 1980, and the refusal to extend it to Tucker on December 4. These events obviously took place less than 6 months prior to the filing of the charge on March 24, 1981.

Assuming arguendo the truth of Ford's testimony that Heinz said on August 20 that Bailey had announced a raise at Tucker, Heinz had no way of knowing that the Company would refuse to bargain over the matter in futuro. According to the Company itself, no bargaining demand was made until September 25, and its August announcement of the raise was perfectly lawful. If so, then how did Heinz' knowledge of it constitute knowledge of an unlawful act, with or without the period of limitation?

I conclude that the Union's knowledge of the August announcement—if indeed it did know—at most constituted ambiguous information, like the first notice of one employee's denial of a merit raise in *Allied Products*. I further note that the Company engaged in other conduct within the limitation period which tended to discredit the Union, and I, therefore, reject the 10(b) defense for the additional reasons set forth in the court's decision in *General Motors Acceptance Corp.*, supra.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Our Way, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Firemen and Oilers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Maintaining since March 6, 1980, a written rule prohibiting soliciting, collecting, or selling during the working time of the soliciting employee or the working time of the employee being solicited, without clarification that such activities are permitted in the workday during periods when employees may legitimately engage in protected activities, such as breaks and lunch periods.

(b) On or about August 22, 1980, orally promulgating a new rule and/or modifying a written rule so as to prohibit any solicitation whatever, any solicitation on company property, and/or any solicitation in another employee's work area during working hours.

(c) On or about July 13, 1981, promulgating a written rule prohibiting solicitation or distribution during working time, even when the soliciting employee is not on working time so long as the solicited employee is on such time, without clarification that such activities are permitted in the workday during periods when employees may legitimately engage in protected activities, such as breaks and lunch periods.

(d) On or about August 22, 1980, telling employees that anyone violating an oral rule against solicitation (which was unlawful) would be fired.

(e) On or about August 22, 1980, telling employees that the plant would be shut down before the Respondent would let the Union come in.

(f) On or about August 22, 1980, telling employees that the Union could not compel the Respondent to give anything to the employees.

(g) On or about August 22, 1980, telling employees that there would be no union at Tucker.

[61] I make no finding on whether this conduct also violated Sec. 8(a)(3).

(h) On or about August 29, 1980, asking an employee whether she had been handing out union cards and whether she had been doing so during lunch periods.

(i) On or about April 28, 1981, telling employees that the Respondent would fire anybody who engaged in a strike.

(j) On or about May 11, 1981, and again on May 12, asking an employee whether another employee made him sign a union card, and soliciting such employee to make a false accusation of coercion by another employee in connection with the signing of union cards.

4. By discharging Betty J. Skidmore on August 29, 1980, because of her union activities, the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. Pursuant to Board certification and clarification thereof, the following unit is now, and has been at all times material herein, an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including truck-drivers and helpers, employed by Respondent at its Bernina Street, Krog Street and Elizabeth Street, Atlanta, Georgia and Tucker, Georgia locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

6. On or about September 25, 1980, and thereafter, the aforesaid Union requested that the Respondent bargain with it as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. By engaging in the following acts and conduct, the Respondent violated Section 8(a)(5) and (1) of the Act:

(a) On or about November 14, 1980, unilaterally granting an increase in wages and benefits to its Tucker employees, without consultation with the Union.

(b) On or about September 25, 1980, and thereafter, refusing to bargain with the Union as the exclusive representative of the employees in the unit described above.

(c) On or about December 4, 1980, and thereafter, refusing to bargain with the Union over the wage and benefit increase described in paragraph 7(a), above.

(d) On or about December 4, 1980, and thereafter, refusing to grant an increase in wages and benefits to its other employees in the unit described above, equivalent to the increase described in paragraph 7(a) above, retroactive to the date of such increase.

(e) On or about June 1, 1980 (effective July 1), changing the Respondent's rules on discipline of employees for absenteeism and tardiness, without notice to or consultation with the Union.

(f) During bargaining sessions with the Union in 1980, failing and refusing on request to give the Union information concerning the change in rules described in paragraph 7(e), above.

(g) On February 10, 1981, discharging employee Larry Grier pursuant to the unlawfully changed rule described above in paragraph 7(e), and reemploy him without backpay on May 6, 1981.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act except as specified herein.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. In accordance with Board practice, such order shall not be construed as requiring the Respondent to withdraw any wage or benefit increase previously granted to employees.

It having been found that the Respondent unlawfully discharged Betty K. Skidmore on August 29, 1980, it is recommended that the Respondent be ordered to offer her immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, dismissing if necessary any employee hired to fill said position, and to make her whole for any loss of earnings she may have suffered by reason of the Respondent's unlawful conduct, by paying to her a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[62]

It having been found that the Respondent unlawfully discharged Larry Grier on February 10, 1981, and reemployed him without backpay on May 6, 1981, it is recommended that the Respondent be ordered to notify Grier that such reemployment is without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered by reason of the Respondent's unlawful conduct, by paying to him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of his reemployment, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, and *Florida Steel Corp.*, supra.[63]

It having been found that the Respondent has refused to bargain with the Union as the collective-bargaining representative of the employees in the unit described above, and has also refused or failed to bargain over an increase in wages and benefits for the Respondent's employees at its Tucker, Georgia plant, it is recommended that the Respondent be ordered to bargain with the Union over these matters, and, if any agreement or agreements are reached, embody them in a signed, written document or documents. It also having been found that the Respondent has unlawfully changed its rules on employee discipline for absenteeism and tardiness with-

[62] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[63] Ibid. See *Boland Co.*, and *Gaska Tape*, supra.

out bargaining with the Union, and has refused on request to supply the Union with information concerning said rules and changes, it is recommended that the Respondent be ordered, on request, to bargain with the Union concerning any such changes, and to supply the Union with information concerning the rules and changes in them.

It has also been found that the Respondent violated the Act by refusing to grant to its represented employees a retroactive increase in wages and benefits equivalent to that which it granted to its unrepresented employees. In *Clearwater Finishing Co.*, supra, the Board approved a recommended order that the employer therein be required to give its represented employees a retroactive raise, with interest, equivalent to that which it had given to the unrepresented employees. The Court of Appeals for the Fourth Circuit disagreed, and refused to enforce this part of the Board's remedial order, with the following language:

> Finally, the Board's order that the Company grant the proposed wage increase retroactively is beyond the scope of its authority as set out in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 . . . (1970). As recently recognized by this court in *Procter and Gamble Co. v. NLRB*, 658 F.2d 968, 988 (4th Cir. 1981), *H. K. Porter Co.* stands for the proposition that the Board has no authority to order agreement on mandatory subjects of bargaining. It is more than clear here, that whether the proposed wage increase would have retroactive application was an element of the collective bargaining agreement being negotiated at the time of the violations. Indeed, at one point during negotiations retroactivity was the only term upon which agreement could not be reached. Thus, the Board had no authority to order agreement on that term.
>
> The Board cites several cases which purport to limit the application of the rule in *H. K. Porter* to cases involving violations of § 8(a)(5). However, the cited cases do not involve a Board order which requires agreement on a term about which negotiations had taken place. We think that the rule of *H. K. Porter* applies equally to orders requiring agreement on subjects of bargaining in cases arising under § 8(a)(1) and 8(a)(5). [*Clearwater Finishing Co.* v. NLRB, supra, 670 F.2d at 468.]

However, in *Eastern Maine Medical Center*, supra, the employer therein also gave a wage increase to unrepresented employees, and this also became "an element of the collective bargaining agreement being negotiated . . ." (*Clearwater Finishing Co.*, id). See 253 NLRB 224 at 254. The Board affirmed a finding that this constituted violations of Section 8(a)(3) and (5) and, as in *Clearwater*, approved an order requiring the employer "to make applicable to such [represented] employees the increased wages and benefits generally granted by Respondent to its unrepresented employees . . . together with interest" (id., 253 NLRB at 250).

The Court of Appeals for the First Circuit enforced this portion of the Board's remedial order together with the remainder thereof, in part with the following language:

> EMMC does not dispute that but for the presence of the union it would have granted the nurses both the 1976 and 1977 pay raises, yet at no time through the end of the negotiations was it willing to offer these sums to the union. Not only did the hospital fail to offer the pay raises retroactively, a practice we held to violate § 8(a)(3) when coupled with bad faith bargaining . . . but it failed to offer, on any terms, more than a fraction of the wages lost by the nurses as a result of their decision to organize. Thus, while suspending any increase until the close of negotiations, and thereby causing wages for some registered nurses to fall behind those of graduate nurses, EMMC also proposed to deny the greater part of the increase permanently to bargaining unit employees. Magnifying this effect, beginning after the election and continuing through bargaining, EMMC announced and implemented a cornucopia of fringe benefits for non-unit employees. . . .
>
> The ALJ justifiably concluded that this conduct belied a desire merely to bring pressure on the union to make concessions and evinced an intent to exact a lasting penalty upon the nurses for their decision to unionize . . . . [*Eastern Maine Medical Center v. NLRB*, supra, 658 F.2d 1 at 9.]

In *Mead Corp.*, 256 NLRB 686 (1981), the employer violated Section 8(a)(5) and (1) by withdrawing a midterm offer during negotiations at a time when it knew that acceptance was imminent. The Board stated that the best way to achieve the status quo ante was to require the employer to reinstate the offer for a specified period of time. The Board met the argument that such a remedy was precluded by the rule in *H. K. Porter* by pointing out that the employer was merely being required to reinstate a proposal which it had "formulated and voluntarily offered," and that it was not being required to abide by a proposal "consistently opposed by it" (id.). It may be noted that the status quo ante can never be achieved in cases like *Clearwater Finishing* and *Eastern Maine Medical Center* by a general bargaining order, because, as lucidly explained by the court in the latter case, the represented employees will never catch up and achieve parity with the unrepresented group.

These cases do not present the same problem of statutory construction which the Supreme Court faced in *H. K. Porter*. In the Board's original decision in that case, the 8(a)(1) finding was derivative in nature, and was predicated on the 8(a)(5) violation. *H. K. Porter Co.*, 153 NLRB 1370 (1965). The extended litigation which followed this decision involved the Board's authority to remedy a violation of Section 8(a)(5). By contrast, in *Eastern Maine Medical Center* and *Clearwater Finishing Co.*, the Board, unlike its original *H. K. Porter* decision, specifically found independent violations of sections of the Act other than Section 8(a)(5).

The employers in these latter cases were merely required by the Board to grant to their represented employees the same wages and benefits which they had

"voluntarily offered" to their unrepresented employees, and which they had unlawfully withheld from the former. Similarly, no one compelled the Respondent herein to grant an increase to its Tucker employees. Indeed, the Company insists that this action was purely "discretionary." Once having taken this voluntary step, however, the Respondent incurred an obligation to prevent an unlawful effect of its freely undertaken action, and this obligation could only have been satisfied by giving its represented employees an equivalent grant.

It is a misreading of Section 8(d) to conclude that the employer's freedom to contract guaranteed by that section—which explains an unlawful refusal to bargain within the meaning of Section 8(a)(5)—may be used as a defense to alleged violations of other sections of the Act. The Supreme Court itself stated in *H. K. Porter* that the "parties' freedom of contract is not absolute," and that "[v]arious practices in enforcing the Act may to some extent limit freedom to contract as the parties desire" (supra, 397 U.S. 99). The clarification in Section 8(d) of an employer's obligation to bargain and the Supreme Court's explanation in *H. K. Porter* of an employer's qualified freedom to contract in the context of an alleged violation of Section 8(a)(5) do not include a license to attack the rights of employees protected in Section 7 and other sections of the Act.

One circuit court decision and several Board cases have held that a retroactive, equivalent grant of wages and benefits is the appropriate remedy in circumstances such as those presented by the instant case. I am bound by Board law and, accordingly, recommend that the Respondent be required to grant each of its Elizabeth Street employees an increase in wages and benefits equivalent to the increase which the Respondent granted to its Tucker employees on November 14, 1980, retroactive to the actual date of such increase or the date of such employee's date of employment, whichever is later, with interest thereon computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.* and *Florida Steel Corp.*, supra.[64] Such increase shall not satisfy the Respondent's additional obligation to bargain with the Union concerning such matters, but rather shall take place immediately, to be followed by performance, on request, of the Respondent's obligation to bargain.

It will also be recommended that the Respondent be required to post appropriate notices, and to rescind the unlawful no-solicitation rules, with notice thereof to each employee.

The Union requests the extraordinary remedy of an award of organizational and litigation expenses on the ground that the Respondent's defense is "part and parcel of an attempt to seek review of the previous unit clarification decision," and that this defense is "patently frivolous and clearly meritless."

With respect to organizational expenses the Board has required that there be some nexus between the allegedly extraordinary expenses and the employer's unlawful conduct. *Tiidee Products*, 194 NLRB 1234, 1236 (1972). Although it is true that the Company refused at the outset of the 1980 negotiations to bargain over the Tucker employees, the certification at the time did not include those employees. It is also true that the Respondent again refused to bargain concerning the Tucker employees after the unit had been clarified to include them. However, the organizational campaign, whose expenses the Union seeks to recover, began in August 1980. At that time, the only unlawful conduct in which the Respondent had engaged was maintenance of a no-solicitation rule which I have herein found to be unlawful by retroactive application of *T.R.W. Bearings*, supra, and the refusal to supply all the work rules. All the rest of the Respondent's unlawful conduct took place after the beginning of the union campaign. That campaign was not precipitated by the Respondent's preceding unlawful conduct, but rather by its refusal to bargain over the Tucker employees. The complaints do not allege a refusal to bargain, however, until after the campaign. Under these circumstances, I find no causal link between the campaign expenses and the Respondent's unlawful conduct.

In *Heck's, Inc.*, 215 NLRB 765 (1974), the Board restated its policy of granting extraordinary relief of the kind here sought in cases where the defense is "frivolous," and of denying it where the issues are "debatable." More recently, the Board with judicial approval has approved another rationale for such relief in cases of sustained and serious unfair labor practices and an employer's "policy of intransigence whereby court-enforced orders of the Board have been flouted and contempt decrees reduced to a mockery." *J. P. Stevens & Co.*, 244 NLRB 407, 457–459 (1979), enfd. 668 F.2d 767 (4th Cir. 1982).

It is true, as I have observed, that the Respondent's refusal to give relevant information to the Union constituted a refusal to honor a prior Board order. It is also true that the Respondent's unlawful conduct has been aggravated and pervasive. However, there has been no flouting of a *court-enforced* Board order or a contempt decree, as in the *J. P. Stevens* cases, and the history of this Respondent's unlawful conduct has not been as extended and persistent. Under these circumstances, and taking into consideration the absence of any connecting link between the Union's campaign expenses and the Company's unlawful conduct, I conclude that a grant of extraordinary relief would not be in accord with established Board policy. It is obvious, however, that another broad order is warranted.

On these findings of fact and conclusions of law and on the entire record,[65] I recommend the following

[64] See generally *Isis Plumbing Co.*, supra.

[65] The Respondent's motion to correct record is hereby granted, except for sec. 49 thereof, which asserts that Ford testified to the "25th" as the date of mailing instead of the transcript record of the "24th." There is no factual basis for this change which, moreover, would not be in the Respondent's favor. Sec. 20 of the Respondent's motion is corrected to indicate p. "756" instead of p. "765." With these corrections, the Respondent's motion in relevant part is made a part hereof as "Appendix B." [Deleted from publication.] The General Counsel's opposition to the first paragraph of sec. 26 of the Respondent's motion is rejected, since the change is consistent with immediately succeeding portions of the transcript, and with Askham's testimony, which I have discredited, that McGaughey's statements to the company officials were not consistent with the police report.

Continued

ORDER[66]

The Respondent, Our Way, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing, maintaining, or enforcing written rules prohibiting union solicitation, or distribution of union materials, during working time, without affirmatively and clearly specifying the times that employees may lawfully engage in such activities.

(b) Promulgating, maintaining, or enforcing oral rules prohibiting any solicitation whatsoever, any solicitation on company property, any solicitation in another employee's work area during working hours, or any solicitation during worktime, without affirmatively and clearly specifying the times that employees may lawfully engage in such activities.

(c) Telling employees that anyone violating a rule against solicitation which is not affirmatively clarified as indicated above in subparagraphs 1(a) and 1(b), or anyone engaging in a strike, will be fired.

(d) Telling employees that the plant will be shut down before the Respondent will let the Union come in.

(e) Telling employees that the Union cannot compel the Respondent to give anything to employees.

(f) Telling employees that there will be no union at Tucker or at any other of the Respondent's plants.

(g) Coercively interrogating employees concerning their union activities.

(h) Asking employees whether other employees made them sign union cards, or soliciting false statements that other employees did so.

(i) Discouraging membership in the International Brotherhood of Firemen and Oilers, AFL-CIO, or any other labor organization, by discharging employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure, or any terms or condition of employment.

(j) Refusing to bargain collectively concerning rates of pay, hours, and other terms and conditions of employment with the aforenamed Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including truck-drivers and helpers, employed by Respondent at its Bernina Street, Krog Street and Elizabeth Street, Atlanta, Georgia and Tucker, Georgia locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(k) Unilaterally granting increases in wages or benefits to its employees without consultation with the aforenamed Union. Nothing herein shall be construed as requiring the Respondent to withdraw any wage or benefit increase previously granted to employees.

(l) Refusing to bargain with the aforenamed Union concerning wage or benefit increases given to its employees.

(m) Refusing to grant retroactive equivalent raises in wages and benefits to employees at one of its plants which it had previously granted to employees at another plant.

(n) Unilaterally changing employee rules concerning working conditions without consultation with the aforenamed Union.

(o) Failing or refusing to give information about employee rules concerning working conditions, or changes therein, to the aforenamed Union.

(p) Discharging or otherwise disciplining employees for violation of unilaterally changed work rules, or such rules as to which the Respondent has failed to supply the aforenamed Union with information thereof.

(q) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Publish a written rescission of its rules described above in subsections 3(a), (b), and (c) of the section of this Decision entitled "Conclusions of Law," and mail a copy of such rescission to each of its employees at his or her last known address.

(b) Offer Betty J. Skidmore immediate and full reinstatement to her former position or, if such position no longer exists, to substantially equivalent position, without prejudice to her seniority or other rights and privileges, discharging if necessary any employee hired to replace her, and make her whole for any loss of earnings she may have suffered by reason of the Respondent's discrimination against her, in the manner described in the section of this Decision entitled "The Remedy."

(c) Notify Larry Grier in writing that he is entitled to the same seniority and other rights and privileges which he would have had absent the Respondent's unlawful discharge of him on February 10, 1981, and make him whole for any loss of earnings he may have suffered because of said unlawful discharge in the manner described in the section of this Decision entitled "The Remedy."

(d) Upon request, recognize and bargain in good faith with the above-named Union as the exclusive representative of all the employees in the aforesaid appropriate unit, concerning wages, hours, and working rules, including the rules affecting levels of discipline for absenteeism and tardiness, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a written signed agremeent.

(e) Upon request, supply the aforenamed Union with information concerning work rules affecting employees in the aforesaid appropriate unit.

(f) Immediately grant to each of its employees at its Elizabeth Street, Atlanta, Georgia location an increase in wages and benefits equivalent to the increase which it granted to its employees at its Tucker, Georgia location about November 14, 1980, retroactive to the actual date

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The General Counsel's motion to strike the word "queer" on l. 1 of p. 168 of the transcript, and to substitute the word "quitter" in lieu thereof is granted, as such change reflects the actual testimony of the witness. All other motions are denied.

[66] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of such increase, or to an individual employee's date of employment, whichever is later, in the manner described in the section of this Decision entitled "The Remedy." Such immediate increase shall be in addition to the Respondent's obligation to bargain concerning same with the aforenamed Union described above.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its locations in Atlanta and Tucker, Georgia, copies of the attached notice marked "Appendix A."[67] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found herein.

[67] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice. We intend to carry out its provisions as follows.

The National Lbaor Relations Act gives all employees these rights:

To form, join, or help unions

To bargain as a group through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refuse to do any or all of these things.

WE WILL NOT do anything to interfere with these rights.

WE WILL NOT discharge or otherwise discriminate against employees because of membership in and/or activities on behalf of International Brotherhood of Firemen and Oilers, AFL-CIO, or any other labor organization.

WE WILL NOT refuse to recognize and, upon request, bargain with the aforenamed Union as the exclusive representative of our employees in the following appropriate bargaining unit:

> All production and maintenance employees, including truck-drivers and helpers, employed by Respondent at our Bernina Street Krog, Street and Elizabeth Street, Atlanta, Georgia and Tucker, Georgia locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

We realize that we have closed our Bernina and Krog Street locations, and that there are no employees there, but we repeat the description of the unit given above because it is the certified unit, and includes our Tucker employees, which addition to the certified unit we shall honor.

WE WILL NOT unilaterally grant increases in wages or benefits to any of our employees in the bargaining unit described above without consulting with the aforenamed Union. WE WILL NOT, however, withdraw any such increases which we have previously granted.

WE WILL NOT unilaterally grant increases in wages or benefits to some of our employees in the unit described above and deny them to others.

WE WILL NOT unilaterally change employee work rules without consulting with the aforenamed Union.

WE WILL NOT refuse to give information concerning employee work rules to the Union.

WE WILL NOT discharge or otherwise discipline employees because of any work rules which we have unilaterally changed without consulting the Union, or any work rule changes concerning which we have refused to give the Union information.

WE WILL NOT issue rules prohibiting solicitation or distribution without clearly telling employees when they may lawfully engage in such activities.

WE WILL NOT tell employees that they will be fired for violating any rules on solicitation and distribution which fail to tell them clearly when they may lawfully engage in such activities, and WE WILL NOT tell employees they will be fired for engaging in a strike.

WE WILL NOT tell employees that the plant will be shut down before we will let the aforenamed union come in.

WE WILL NOT tell employees that the Union cannot compel us to give anything to our employees.

WE WILL NOT tell employees that there will be "no union" at our Tucker location, or at any other of our locations.

WE WILL NOT coercively interrogate our employees concerning their union activities or sympathies.

WE WILL NOT ask employees whether other employees made them sign union cards, and WE WILL NOT attempt to get employees to sign false statements that other

employees made them sign union cards, or to sign any other false statement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL publish a rescission of work rule 7 concerning solicitation, the rule on "Solicitation/Distribution" printed on page 18 of our "Employee Handbook," and any and all oral rules concerning solicitation or distribution which we have promulgated, and WE WILL mail a copy of such rescission to each of our employees in the unit described above.

WE WILL offer Betty J. Skidmore full and immediate reinstatement to her former position or, if any such job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, discharging if necessary any employee hired to replace her, and WE WILL make her whole for any loss of earnings she may have suffered because we discharged her, by paying her backpay with interest.

WE WILL notify Larry Grier in writing that he is entitled to the same seniority and other rights and privileges which he would have had if we had not unlawfully discharged him on February 10, 1981, and WE WILL make him whole for any loss of earnings he may have suffered because of his discharge, by paying him backpay with interest.

WE WILL immediately grant to our Elizabeth Street employees an increase in wages and benefits equivalent to the increases which we previously granted to our Tucker employees, retroactively to the date of the Tucker increase, or to an employee's beginning date of employment, whichever is later, with interest.

WE WILL, on request, bargain collectively with the aforenamed Union as the exclusive representative of the employees in the bargaining unit described above with respect to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, WE WILL embody such understanding in a signed written agreement.

OUR WAY, INC.